Supreme Court, U.S.
FILED

(1)

No. 03-498 SEP 30 2003

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In The
# Supreme Court of the United States

STEPHEN AMELKIN; DR. BRIAN CHRISTOPHER FEE; STUART LYON; NICHOLAS BAKER; DAVID KAPLAN; JAMES W. CHAMBERS; SIDNEY HANISH; RHODA DANIELS; THOMAS H. WATSON; KENNETH W. WALL; JAMES BOGARD,

*Petitioners,*

v.

ANN McCLURE, Document Custodian; GARY ROSE, Commissioner of Department of State Police; JUSTICE CABINET; DEPARTMENT OF STATE POLICE; and BEN CHANDLER, Attorney General for the Commonwealth of Kentucky,

AND

LOUISVILLE AND JEFFERSON COUNTY METROPOLITAN SEWER DISTRICT,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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124 pp

## QUESTION PRESENTED FOR REVIEW

Whether a state statute which prohibits making public information available to those who would use the information to engage in commercial speech, but which permits making the same information available to news gathering organizations, is unconstitutional as discriminating based upon the character of the proposed speech, contrary to the First and Fourteenth Amendments.

## LIST OF PARENT COMPANIES AND NON-WHOLLY OWNED SUBSIDIARIES

None of the Petitioners are corporations, and, therefore, there are no parent companies or non-wholly owned subsidiaries of any Petitioner.

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## CITATIONS TO OPINIONS BELOW

The fourth and most recent opinion of the United States Court of Appeals for the Sixth Circuit in this case dated June 2, 2003 (***"Amelkin IV"***) on the third appeal from the United States District Court for the Western District of Kentucky is reported at 330 F.3d 822, and is reprinted in the appendix to this petition beginning at 1a.

The third and most recent opinion of the United States District Court for the Western District of Kentucky in this case dated December 20, 2001 is reported at 178 F.Supp.2d 766, and is reprinted in the appendix to this petition beginning at 14a.

The order of the United States Supreme Court dated October 2, 2000 denying certiorari appears at 531 U.S. 871, and is reprinted in the appendix to this petition at 24a.

The third opinion of the United States Court of Appeals for the Sixth Circuit dated February 24, 2000 (***"Amelkin III"***) on remand from the United States Supreme Court is reported at 205 F.3d 293, and is reprinted in the appendix to this petition beginning at 25a.

The order of the United Stated Supreme Court dated December 13, 1999, granting the writ of certiorari of Respondents Ann McClure, *et al.*, and vacating the second opinion of the United States Court of Appeals for the Sixth Circuit is reported at 528 U.S. 1059, and is reprinted in the appendix to this petition at 32a.

The second opinion of the United States Court of Appeals for the Sixth Circuit dated February 17, 1999 (***"Amelkin II"***) on the second appeal from the United States District Court for the Western District of Kentucky

is reported at 168 F.3d 893, and is reprinted in the appendix to this petition beginning at 33a.

The second opinion of the United States District Court for the Western District of Kentucky dated June 3, 1996 is reported at 936 F.Supp. 428, and is not reprinted in the appendix to this petition.

The first opinion of the United States Court of Appeals for the Sixth Circuit dated January 9, 1996 (***"Amelkin I"***) is reported at 74 F.3d 1240 (Table), and is not reprinted in the appendix to this petition.

The first opinion of the United States District Court for the Western District of Kentucky dated August 2, 1994 is not reported and is not reprinted in this appendix.

## JURISDICTION

On June 2, 2003, the United States Court of Appeals for the Sixth Circuit affirmed the decision of the United States District Court for the Western District of Kentucky, dismissing Petitioner's claims. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

## STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the First Amendment to the Constitution of the United States, which provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech,

> or of the press; or of the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

This case also involves the Fourteenth Amendment to the Constitution of the United States, which provides in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The state statutes involved in this case include KRS 189.635(5) and (6). Petitioners have reproduced the full text of KRS 189.635 in the appendix beginning at 57a, and provide the portions of the statutes relevant to the Petition here:

KRS 189.635(5) provides:

> All accident reports filed with the Department of State Police in compliance with subsection (4) above shall remain confidential except that the department may disclose the identity of a person involved in an accident when his identity is not otherwise known or when he denies his presence at an accident. All other accident reports required by this section, and the information contained in the reports, shall be confidential and exempt from public disclosure except when produced pursuant to a properly executed subpoena or court order, or except pursuant to subsection (6) of this section. These reports shall be made available only to the parties to the accident, the parents or guardians of a minor who is a party to

> the accident, and the insurers of any party who is the subject of the report, or to the attorneys of the parties.

KRS 189.635(6) provides:

> The report shall be made available to a news-gathering organization, solely for the purpose of publishing or broadcasting the news. The news-gathering organization shall not use or distribute the report, or knowingly allow its use or distribution, for a commercial purpose other than the news-gathering organization's publication or broadcasting of the information in the report. A newspaper, periodical, or radio or television station shall not be held to have used or knowingly allowed the use of the report for commercial purpose merely because of its publication or broadcast.

Petitioners have reproduced KRS 61.870, the definitions for KRS 61.874, and the entirety of KRS 61.874 and KRS 61.8745 in the appendix beginning at 60a.

KRS 61.874 provides in pertinent part:

> . . .
>
> (3) The public agency may prescribe a reasonable fee for making copies of nonexempt public records requested for use for noncommercial purposes which shall not exceed the actual cost of reproduction, including the costs of the media and any mechanical processing cost incurred by the public agency, but not including the cost of staff required. . . .
>
> (4)(a) Unless an enactment of the General Assembly prohibits the disclosure of public records to persons who intend to use them for commercial

purposes, if copies of nonexempt public records are requested for commercial purposes, the public agency may establish a reasonable fee.

(b) The public agency from which copies of nonexempt public records are requested for a commercial purpose may require a certified statement from the requestor stating the commercial purpose for which they shall be used, and may require the requestor to enter into a contract with the agency. The contract shall permit use of the public records for the stated commercial purpose for a specified fee.

(c) The fee provided for in subsection (a) of this section may be based on one or both of the following:

1. Cost to the public agency of media, mechanical processing, and staff required to produce a copy of the public record or records;

2. Cost to the public agency of the creation, purchase, or other acquisition of the public records.

(5) It shall be unlawful for a person to obtain a copy of any part of a public record for a:

(a) Commercial purpose, without stating the commercial purpose, if a certified statement from the requestor was required by the public agency pursuant to subsection (4)(b) of this section; or

(b) Commercial purpose, if the person uses or knowingly allows the use of the public record for a different commercial purpose; or

(c) Noncommercial purpose, if the person uses or knowingly allows the use of the public record for a commercial purpose. A newspaper, periodical, radio or television station shall not be held to

> have used or knowingly allowed the use of the public record for a commercial purpose merely because of its publication or broadcast, unless it has also given its express permission for that commercial use.

This statute is fully reproduced in the appendix at 64a.

KRS 61.8745 provides:

> **Damages recoverable by public agency for person's misuse of public records.**
>
> A person who violates subsections (2) to (6) of KRS 61.874 shall be liable to the public agency from which the public records were obtained for damages in the amount of:
>
> (1) Three (3) times the amount that would have been charged for the public record if the actual commercial purpose for which it was obtained or used had been stated:
>
> (2) Costs and reasonable attorney's fees; and
>
> (3) Any other penalty established by law.

This statute is reproduced in the appendix at 68a.

## STATEMENT OF THE CASE

### I. Procedural history of the case.

This case has previously been before this Court on a Petition for a Writ of Certiorari filed by the Respondents seeking review of the United States Court of Appeals for the Sixth Circuit's affirmance of a District Court's injunction against enforcement of Kentucky statutes,

KRS 189.635(5) and (6), as an unconstitutional infringement of the Petitioners' First Amendment right to freedom of expression. The Sixth Circuit opinion in question appears in *Amelkin v. McClure,* 168 F.3d 893, 902 (6th Cir. 1999) (***Amelkin II***). (Appendix beginning at p. 33a. Hereafter "App. at ___").

While this case was pending on Respondents' Petition, on December 7, 1999, this Court reversed the ruling of the United States Court of Appeals for the Ninth Circuit in *Los Angeles Police Dept. v. United Reporting Pub. Corp.*, 528 U.S. 32 (1999). (App. at 69a). The Ninth Circuit had ruled that a statute similar to the Kentucky statute under consideration here unconstitutionally infringed upon the First Amendment commercial speech rights of the plaintiff United Reporting. This Court reversed the Ninth Circuit's *United Reporting* decision because it had permitted an improper facial challenge to a restriction on commercial speech. Without addressing the merits of the claims or the procedural history of *this* case, on December 13, 1999, this Court granted the Respondents' Petition for a Writ of Certiorari and remanded this case to the Sixth Circuit for further consideration in light of *United Reporting*. (App. at 32a).

Pursuant to the remand order, on February 24, 2000, the Sixth Circuit reversed the District Court's decision on the grounds that the Kentucky statute in issue was *not* subject to a facial challenge and further remanded the case to the District Court for consideration of an as-applied challenge. *Amelkin v. McClure*, 205 F.3d 293, 296 (6th Cir. 2000) (***Amelkin III***). (App. at 25a).

Thereafter, Petitioners sought certiorari in this Court which was denied. (App. at 24a).

On remand the United States District Court for the Western District of Kentucky concluded that *United Reporting* provided a "road map" for determining the merits of an as-applied challenge to the statutes in question. (App. at 21a). The District Court then found that the as-applied challenge failed for essentially the same reasons as the facial challenge in *United Reporting*. (App. at 22a).

On June 2, 2003 contrary to its earlier decision in ***Amelkin II*** (App. at 33a), the Sixth Circuit in ***Amelkin IV*** *upheld* the District Court's decision finding that the statute as applied did not violate Petitioners' rights either under the First Amendment or under the Equal Protection Clause of the Fourteenth Amendment. *Amelkin v. McClure*, 330 F.3d 822 (6th Cir. 2003). (App. at 1a).

This petition followed.

## II. Factual Background

Petitioners are attorneys, chiropractors and the publisher of a proposed newspaper which would, among other things, publish information gathered from traffic accident reports. Petitioners filed this action in 1994 to challenge newly-enacted amendments to two Kentucky statutes. The amendments to KRS 189.635 prohibit the disclosure of traffic accident reports to anyone other than parties to the accident, the insurer of any party who is the subject of the report, or to the attorneys of the parties. Another exception to this restricted access allows disclosure of reports to "news-gathering" organizations, which are themselves restricted to using them for the purpose of publishing or broadcasting the news. KRS 189.635(6).

Prior to enactment of these statutes, accident reports filed by law enforcement officers and agencies were not considered confidential and were open records obtainable by any individual under Kentucky's open records law. Kentucky Attorney General Opinion 89-76. Accordingly, the attorney and chiropractor Petitioners had routinely obtained copies of the reports and "would use the information contained therein to contact victims and offer their services, . . . " *Amelkin v. McClure,* 168 F.3d 893, 895 (6th Cir. 1999) (***"Amelkin II"***). (App. at 33a). The Petitioner publisher had "in the past made a business out of assisting these attorneys and chiropractors by supplying them with the accident reports that he ha[d] obtained from law enforcement agencies" and in addition, "intend[ed] to publish a newspaper, The Accidental Journal, that [would] contain copies of accident reports and that [would] be marketed primarily to attorneys and chiropractors." *Id.* at 36a. The Accidental Journal would also include timely article of interest.

"Almost immediately after passage" of the amendments, Petitioners filed suit "in an effort to enjoin enforcement of the statutes. They claimed that the statutes infringe on their First Amendment right to freedom of expression. Following a lengthy hearing, the District Court permanently enjoined the enforcement of both statutes, holding that they violated the First Amendment."

*Id.* at 897.[1] After reviewing the evidence, which demonstrated that the intent of the statute was to prevent commercial speech, the district court found the amendments unconstitutional.

Following the first successful challenge to the KRS 189.635 in the Summer of 1994, the state took two additional steps: First it began relying upon 1994 amendments to Kentucky's Open Records Act appearing at KRS 61.874(3) and KRS 61.874(4) and KRS 61.8745. Adopted at the same time in 1994 as the amendments to KRS 189.635, KRS 61.874(3) provides that when records are sought for non-commercial purposes, the state may not charge any more than the "actual costs of reproduction." On the other hand, under KRS 61.874(4), the state is permitted to charge for records obtained for commercial purposes the costs "to the agency of the creation, purchase or other acquisition of the public records." KRS 61.874(4) further provides that it is unlawful for a person to obtain a record for a commercial purpose without informing the agency of this fact or to use the record for a different commercial purpose than that originally disclosed to the agency. In order to enforce the provisions of KRS 61.874(3) and (4), KRS 61.8745 provides for a fine of three times the

[1] In the district court, Petitioners had also challenged the constitutionality of KRS 61.874, which permits Kentucky to charge a fee for providing copies of records to persons who intend to use them for a commercial purpose. Petitioners had argued that Kentucky's interpretation of the statute as allowing it to charge a fee so greatly in excess of the normal fee charged for copies as to make access to the records economically prohibitive was unconstitutional. Because the district court enjoined enforcement of KRS 61.874 without making findings of fact or conclusions of law, the Sixth Circuit reversed and remanded that decision for further proceedings.

amount that would have been charged for the records, plus attorneys fees, if records are obtained for one purpose and then used for another purpose.

Based upon these amendments, the state began exponentially increasing the costs of accident reports to the Petitioners. As quoted in ***Amelkin II***: "The State increased the costs of the reports from $.10 per page to $40.00 per report for non-injury accidents, $90 per report for injury accidents and $230 per report for fatal accidents. The proposed charges for the [Petitioner] Lyon for two weeks of reports would have been $17,650.00. Previously the reports would have cost him about $68.00". (App. at 52a).

To further limit use of the accident reports, a statute was adopted in 1996 which criminally punished commercial speakers. At that time when the constitutionality of the limitations on disclosure of accident reports was under attack in the Federal Courts and the statutes in question had been subject to an injunction in the Federal Courts, the Kentucky General Assembly adopted KRS 21A.300 and .310 making it a Class A misdemeanor subject to 12 months imprisonment for an attorney to solicit employment relating to a criminal or civil action "arising out of [a] traffic citation, injury accident or disaster" for a 30-day period. Accordingly, an attorney who otherwise lawfully obtained automobile accident reports could not use the report for thirty days after an accident without fear of criminal liability.[2]

---

[2] The constitutionality of KRS 21A.300 and 21A.310 was upheld in *Chambers v. Stengel,* 256 F.3d 397 (6th Cir. 2001).

Following a procedural reversal by the Sixth Circuit and a second hearing in 1996, the District Court after reviewing the evidence, which demonstrated that the intent of the statute was to prevent commercial speech, again found the amendments unconstitutional:

> [I]t is obvious that the State of Kentucky is trying to prohibit attorneys and chiropractors from access to a record which has been compiled by the public and which is available to media and insurance companies representing the parties, and which had been previously available to the public. We believe that the fact that this information is available to the media and insurers is sufficient to warrant the holding that the privacy interest which the state asserts in defense of the statute is not protected by the restriction of the public records to newspapers and insurers.

*Amelkin v. Comm'r*, 936 F.Supp. 428, 431 (W.D. Ky. 1996)

On appeal, the Sixth Circuit affirmed. It found that the restriction on news-gathering organizations' use of the reports was a content-based restriction with respect to news organizations which makes § 189.635 fatally flawed. *Amelkin v. McClure*, 168 F.3d 893 (6th Cir. 1999) (App. at 46a-48a). The Sixth Circuit rejected the Respondents' argument that KRS 189.635 was constitutional as a "pure denial of access statute," concluding that the statute "is not as benign as the defendants would have us believe." *Id.* at 897. Instead, the Sixth Circuit determined that restricting a "news-gathering organization from using or distributing any accident report that it obtains for a commercial purpose, other than to publish or broadcast the information in a news report" was a "content-based

restriction with respect to news organizations which makes § 189.635 fatally flawed." *Id.*

Applying this Court's test for analyzing the constitutionality of government regulations limiting commercial speech established in *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York,* 447 U.S. 557 (1980), the Sixth Circuit found that the amended statute did not directly and materially advance that interest in protecting the privacy and safety of accident victims. First, the Sixth Circuit noted that the Respondents:

> provided no evidence, aside from general averments contained in affidavits, that would support the contention that criminals would use accident reports to harass or further harm accident victims if they had access to the information contained in such reports. The personal information contained in accident reports was in fact available to the general public prior to the amendment of § 189.635, without any evidence of adverse consequences. . . . This asserted harm, therefore, appears to be nothing more than the type of speculation and conjecture that is insufficient to sustain a restriction on commercial speech.

*Id.* at 899, *citing Rubin v. Coors Brewing, Co.,* 514 U.S. 476, 487 (1995). (App. at 45a).

The Sixth Circuit found the Respondents' second argument in support of the statutes ("to prevent the direct and unnecessary intrusion into the private lives of accident victims") to be:

> at least directly and materially linked to the restriction on access to accident reports. The problem, however, is that the statutory exceptions

> serve to neutralize the government's attempts to protect the privacy of accident victims . . . The fact that newspapers may inspect and report on the information contained in accident reports belies the defendants' claim that the statute is actually intended to protect the privacy interest of accident victims.

***Amelkin II***, 168 F.3d at 899. (App. at 46a). The Sixth Circuit concluded that "the exception to § 189.635(5) for news-gathering organizations precludes the statute from directly and materially advancing the government's purported privacy interest." *Id., citing Valley Broadcasting Co. v. United States*, 107 F.3d 1328, 1334 (9th Cir. 1997):

> There is no rational basis for a statute which purports to advance the governmental interest in protecting the privacy of accident victims to allow their names and addresses to be published or broadcast to the general public. . . . The exceptions to § 189.635 'undermine and counteract' the asserted governmental interest in preserving privacy just as surely as did the exceptions in *Coors Brewing*. We therefore conclude that § 189.635(6) fails to satisfy the third prong of *Central Hudson*.

***Amelkin II***, 168 F.3d at 900. (App. at 47a).

Respondents filed a Petition for Writ of Certiorari, and this Court on December 13, 1999, granted certiorari and remanded for further consideration in light of *Los Angeles Police Dept. v. United Reporting Pub. Corp*, 528 U.S. 32. (App. at 32a). On remand, the Sixth Circuit reversed the District Court decision and further remanded to the District Court for consideration of Petitioners' as-applied challenge. (App. at 25a).

On further remand the District Court found no difference between Petitioners' as-applied challenge and the facial challenge in *United Reporting*, holding that "[b]ecause freedom of speech is not implicated here, the legislative judgment of the General Assembly should be left undisturbed." (App. at 22a).

On appeal, the Sixth Circuit began its decision by recognizing that the *Amelkin* case differed from the *United Reporting* case in that the *Amelkin* appellants' personal rights were implicated by the denial of the documents in question, thus permitting an as-applied challenge. (App. at 7a). The Court then considered the merits of Petitioners' First Amendment challenge to KRS 189.635 and held that the statute in question "does not restrict or even regulate expression." (App. at 8a).

While the Sixth Circuit recognized that there were instances where a state could not engage in viewpoint discrimination with respect to the use of public documents under the so called "unconstitutional-conditions" doctrine, (App. at 9a) the Court found, however, that the Kentucky statute in question "does not condition the disclosure of accident reports on the nature of the recipient's speech." (App. at 10a).

The Court then went on to consider the equal protection argument and whether KRS 189.635(5) and (6) rationally further a legitimate state interest, employing a standard less stringent than the protected speech analysis employed in commercial speech cases. The Court held that a legitimate state interest had been established and, therefore, affirmed the decision of the District Court. (App. at 12a, 13a).

With respect to Petitioners' claims that KRS 61.874(3) and (4) which had permitted a public agency to charge upwards of $17,000 for accident reports to be used for commercial speech which reports had cost about $68.00 before the adoption of the amendments to KRS 61.874, the Sixth Circuit ruled the claim moot because the Petitioners are "not entitled to the accident reports they seek." (App. at 13a).

In reaching its conclusion, the Sixth Circuit committed two errors of law because it apparently did not recall, first, who the parties to the case were, and, second, all of the statutory provisions which were involved.

Thus, in addition to chiropractors and lawyers, a newspaper was also a party to the action. Specifically, as the Court failed to recognize in ***Amelkin IV,*** but recognized in ***Amelkin II***:

> Plaintiff James Bogard has in the past made a business out of assisting these attorneys and chiropractors by supplying them with the accident reports that he has obtained from law enforcement agencies. Bogard also intends to publish a newspaper, *The Accidental Journal* that will contain copies of accident reports [and other information] and that will be marketed primarily to attorneys and chiropractors.

(App. at 35a, 36a).

Also, the Sixth Circuit failed to recognize the substantial legal impediments imposed by the Kentucky statute upon persons who lawfully obtain the accident reports in question but desire to use them for commercial speech purposes. The Sixth Circuit in its ***Amelkin II*** decision had recognized that KRS 189.635 prohibits newspapers such

as Mr. Bogard's *The Accidental Journal* from subsequently using accident reports for commercial speech purposes even if the reports had initially been lawfully obtained for non-commercial newspaper publication purposes. *See* KRS 189.635(5). Thus the statement in the Sixth Circuit's opinion that "plaintiffs cannot prevail on the basis that the statute may be constitutional as applied to news gathering organizations that have obtained accident reports" is plain error. (App at 8a).

Moreover, the entire statutory scheme *does* impose impediments on persons who could have lawfully obtained the accident reports to begin with. Accordingly, the statement that "the statute in question places no restriction on how they may use the information" (App. at 8a) is also incorrect. As pointed out above, Petitioners have challenged the statutory scheme because it imposes a penalty on persons who acquire accident reports for one purpose and then seek to use them for commercial purposes. Specifically, the statutes permits the state to impose a triple penalty upon those who use the reports for a commercial purpose. KRS 61.8745. Thus the statement by the Sixth Circuit that the statute places no restriction on how lawfully obtained information may be used is incorrect.

## REASONS FOR GRANTING THE WRIT

### I. The issue sought to be resolved by the United States Supreme Court in *United Reporting* remains unresolved because of United Reporting's lack of standing to raise the issue in that case; the *Amelkin* Petitioners plainly have standing in this case.

This Court granted certiorari in *United Reporting* in the face of several conflicting court decisions about whether the states could discriminate between commercial and non-commercial messages in making public records available to commercial speakers.[3] (For a further discussion of these conflicting decisions, see Section II *infra.*) In its decision in *United Reporting*, this Court determined that the Respondent United Reporting Publishing Corporation did *not* have standing to challenge the California statute on its face because it had not attempted to obtain the public records and because its challenge sought "to rely on the effect of the statutes on parties not before the Court – its potential customers for example . . . " (App. at 76a). In the instant case, however, the *Amelkin* Petitioners have personally attempted to obtain the accident reports in question but were denied the information by state authorities under the Kentucky statutes in question. Moreover, the *Amelkin* Petitioners primarily are seeking to obtain the information in question for their own use as opposed to the situation in *United Reporting* where United

[3] The *United Reporting* Petitioner, the Los Angeles Police Department, had specifically sought review of the Ninth Circuit's decision in the United States Supreme Court because of the existence of a conflict in the circuits on this issue. That conflict still exists as discussed in Section II and it should be resolved in the *Amelkin* case.

Reporting Publishing Corporation was seeking to obtain the information for use by others. Thus, the *Amelkin* case squarely presents the issue about which review was unsuccessfully sought in *United Reporting*.

That the issue in question remains unresolved and is worthy of certiorari is apparent because four of the Justices in *United Reporting* – Justices Scalia and Thomas in concurrence and Justices Stephens and Kennedy in dissent – believed that the California statute *as applied* raised serious constitutional questions under the First Amendment.

Thus, in their concurring opinions, Justices Scalia and Thomas recognized that the unresolved question was:

> Whether a restriction upon access that *allows* access to the press (which in effect makes the information part of the public domain), but at the same time *denies* access to persons who wish to use the information for certain speech purposes, is in reality a restriction upon speech rather than upon access to government information.

(App. at 78a).

Likewise in their dissenting opinion, Justices Stevens and Kennedy recognized that the California statute permitted making information available to news media and others "while denying access to a narrow category of persons solely because they intended to use the information for a constitutionally protected purpose." (App. at 82a). The Dissenters also recognized that "the only justification advanced by the state in its asserted interest was in protecting the privacy of victims" which the dissenters found to be "insufficient when the data can be published in the news media . . . " (App. at 83a). In concluding, the

Dissenters found that the asserted state interest must fail because, at its core, it relies on discrimination against disfavored speech. (App. at 84a).

Four other Justices – Justices Ginsberg, O'Connor, Souter and Breyer – on grounds narrowly applicable to the California statute in issue – believed that no First Amendment issue was raised. Justices Ginsburg, O'Connor, Souter and Breyer concluded that the California statute in issue did not restrict speakers from conveying information they already possess and that a person who came into the information lawfully "is free to use that information as she sees fit." (App. at 79a). The concurring Justices further believed that the California statute would be an unconstitutional limitation on speech "if it then prohibited people from using the published information to speak to or about arrestees." (App. at 79a).

The statutes at issue in *Amelkin* are fundamentally different from the California statute at issue in *United Reporting* because they do prohibit a newspaper such as Mr. Bogards' *Accidental Journal* from using information he obtained in his capacity as a news gatherer for commercial speech purposes. KRS 189.635(6). Likewise, if for example, one of the lawyer Petitioners had "properly" obtained an accident report to represent a client, he would be forbidden, without paying a fine under KRS 61.8745, from transferring the information to a chiropractor for use in soliciting patients. That the Kentucky statutes in question are far different in this regard from the California statute at issue in *United Reporting*, is another grounds for granting certiorari.

## II. The circuit courts of appeal and state courts of last resort are irreconcilably divided on this frequently recurring question of federal law.

This Court should grant certiorari to resolve the well-recognized division in the lower courts over whether, consistent with the First Amendment, a state may discriminate in its release of police reports on the basis of whether they will be used to engage in commercial or non-commercial speech. Four circuit courts of appeal, including the Sixth Circuit in ***Amelkin II***, and the Ninth Circuit in *United Reporting Pub. Corp. v. California Highway Patrol*, 146 F.3d 1133, 1143 (9th Cir. 1998), have at one time or another determined that such statutes unconstitutionally infringe on the First Amendment rights of commercial requesters of accidents or other police records. One circuit court has found such measures to be constitutional, along with the court of last resort of two states.

In *Speer v. Miller,* 15 F.3d 1007 (11th Cir. 1994), the Eleventh Circuit found a comparable statute unconstitutional because "any privacy arguments the state asserts are disingenuous in light of the fact that the statute carves out an exception for the media to place any information they obtain on the front page of any newspaper in Georgia." *Id.* at 1011 n.7. This conclusion was also reached by the Fifth Circuit in *Innovative Database Sys. v. Morales,* 990 F.2d 217 (5th Cir. 1993). District courts have struck down similar statutes enacted in Georgia, Texas, Florida, and New Mexico. *Statewide Detective Agency v. Miller*, 1998 W.L. 1785456 (N.D. Ga. August 12, 1998); *Babkes v. Satz*, 944 F. Supp. 909 (S.D. Fla. 1996); *Moore v. Morales*, 843 F. Supp. 1124 (S.D. Tex. 1994), *on appeal of separate issue, aff'd in part and rev'd in part*, 63 F.3d 358 (5th Cir. 1995), *cert. denied,* 516 U.S. 1115 (1996); *LaSalle v. Udell*,

Case No. 94-O404-M, unpublished opinion and order (D.N.M. February 16, 1996).

On the other hand, the Tenth Circuit has reached the opposite conclusion, finding in *Lanphere & Urbaniak v. State of Colorado,* 21 F.3d 1508 (10th Cir.), *cert. denied,* 513 U.S. 1044 (1994), that a Colorado statute allowing the release of law enforcement records except to those who would "use them for the purpose of soliciting business for pecuniary gain" was constitutional because it "has not completely banned direct mail solicitation for pecuniary gain of any particular group." *Id.* at 1515. The Tenth Circuit also expressly rejected the contention, central to the Sixth Circuit's ruling in ***Amelkin II***, that exceptions allowing the use of allegedly private information undermine the State's reasons for enacting the statute. *Id.* at 1514.

Siding with the Tenth Circuit was the South Carolina Supreme Court which, in *DeSalvo v. Louisiana,* 624 So.2d 897 (La. 1993), *cert. denied,* 510 U.S. 1117 (1994), held that a similar statute was not unconstitutional. On the other hand, the Texas Court of Appeals in *Anderson Courier Service v. State of Texas*, 104 S.W.3d 121, 124 (Tex App. 2003) ruled that a similar Texas statute, H.B. 1544, limiting the use of accident reports, failed the third prong of the *Central Hudson* test.

Not only are there conflicting decisions among the circuits, but, as pointed out above, the Sixth Circuit has taken wholly inconsistent views of the same statute at different times. In ***Amelkin II*** the Sixth Circuit found that the statute in question *did* implicate important commercial speech rights and that the statute was unconstitutional. In ***Amelkin IV***, on the other hand, the Sixth

Circuit found that the same statute was not contrary to the First Amendment.

Certiorari is also warranted because the decision below directly implicates another important conflict in the lower courts which have divided over the constitutionality of a closely related commercial-use prohibition involving campaign finance records. The federal government and many states permit the release of campaign contribution records, but only so long as the recipient agrees not to use the information for commercial solicitation purposes. The *en banc* D.C. Circuit upheld the federal statute in *Fed. Election Comm'n v. Int'l Funding Inst. Inc.*, 969 F.2d 1110, *cert. denied,* 506 U.S. 1001 (1992), despite the fact that "[t]he information in the report submitted by a political committee may freely be copied, published, and, with one exception, used in any way." *Id.* at 1117. The Supreme Court of Missouri, however, invalidated that state's parallel statute in *Ryan v. Kirkpatrick,* 669 S.W.2d 215 (Mo. 1984) (*en banc*). And, the Second Circuit has narrowly construed the federal provision in light of serious concerns about its constitutionality. *Fed. Election Comm'n v. Political Contributions Data Inc.*, 943 F.2d 190, 195 (2d Cir. 1991).

## III. The Sixth Circuit in Amlekin IV has Decided an Important First Amendment Issue in a Way Which Conflicts with Decisions of this Court

### A. As Content-Based Restrictions On Commercial Speech, KRS 189.635(5) and (6) Violate the First Amendment; Denying Public Records Based on the Requester's Intended Expressive Use of the Records Is a Use, Not an Access, Restriction.

*Central Hudson Gas and Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557, 566 (1980) forbids the Respondents from restricting speech except upon showings of a substantial interest and that the restriction directly and materially advances the substantial interest in a manner no more extensive than necessary. Mere speculation or conjecture by the government in attempting to meet its burden will not suffice. *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993). "The State's burden is not slight. . . . [It] must demonstrate that the harms it recites are real and that its restrictions will in fact alleviate them to a material degree." *Ibanez v. Florida Dept. of Business and Prof'l Regulation, Bd. of Accountancy*, 512 U.S. 136, 143 (1994). Respondents cannot satisfy their weighty burden, as they have attempted to here, with arguments that "amount to little more than unsupported assertions." *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 647 (1985); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 504 (1996); *Edenfield*, 507 U.S. at 769. Regulations that single out a business solely on the basis of the content of the material it may sell or distribute presumptively violate the First Amendment and can be justified, if at all, only by a compelling government interest. *Minneapolis Star and Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983).

This Court has underscored that commercial messages play a central role in public life, and has developed law to insure that consumers have access to accurate information about the availability of goods and services. *44 Liquormart*, 517 U.S. at 496; *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 482 (1995); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 757 (1976) (private economic decisions must be intelligent and well informed; to this end, the free flow of commercial information is indispensable). This Court has rejected paternalistic assumptions that the public will use truthful commercial information unwisely, and has found that people will perceive their own best interests if well enough informed. *44 Liquormart*, 517 U.S. at 497 ("It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us.") For this reason more than a decade ago this Court invalidated bans on targeted direct mail solicitation by lawyers and other professionals. *Shapero v. Kentucky Bar Ass'n.*, 486 U.S. 466, 476 (1988).

As content-based restrictions on commercial speech, KRS 189.635(5) and (6) cannot survive the *Central Hudson* test. The Sixth Circuit in ***Amelkin II*** correctly found the publication of the records by newspapers precludes the statutes from directly and materially advancing any purported government interest in protecting the privacy of persons involved in accidents.

The government bears the burden under *Central Hudson* of demonstrating that a speech restriction "directly advances the governmental interest asserted" *See, e.g., Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, 527 U.S. 173, 183 (1999); *Edenfield*, 507

U.S. at 770. The government must show that a "ban will significantly advance the State's interest", *44 Liquormart*, 517 U.S. at 505 (plurality opinion), and "that harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield*, 507 U.S. at 770. In this case, as in *Greater New Orleans,* the government's stated interest in protecting privacy is undermined directly and fatally by the significant exceptions in the statute so that it cannot "directly and materially advance" this goal.

KRS 189.635(5) and (6), as applied, operate as two-tiered publication restrictions. First, they allow publication of information only by individuals who have one of a defined set of "purposes" for using the information. Second, they permit the state to require these individuals to sign a statement that the information in question will not be published directly or indirectly by these individuals or others to whom they may transfer the information for commercial purposes. *See* KRS 189.635(5).

Respondents labor to protect the statutes' restriction on publishing information contained in public records by characterizing the statutes as simple restrictions on access to those records. However, the statutes are obviously aimed at restricting the use of, not access to, the information in question. This is apparent from the plain language of the statutes which imposes fines based upon the *use* of not the initial access to the records. The statutes' aims are particularly apparent from the history of their enforcement against the Respondents.

A principal purpose of the statutes is undeniably to suppress speech in the form of commercial solicitation. Indeed, the state is attempting to achieve by other means

what another agency of the same state – the Kentucky Bar Association – was unable to achieve in *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1993). But, a state cannot escape heightened First Amendment scrutiny by reframing its suppression of speech as a regulation of access. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540 (1993). (Government may not regulate speech or religion under the guise of regulating activities).

### B. The State May Not Suppress Commercial Speech About a Subject While Permitting Pure Speech About the Same Subject.

The amended statutes absolutely prohibit the Appellant attorneys and chiropractors from directly obtaining automobile accident reports. At the same time, they permit newspapers access to these same reports, acknowledging their right to publish the information in question. In *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993), the Court held that a regulation barring the distribution of "commercial handbills" in newsracks on public property but allowing newspaper use of the same newsracks on the same public property, violated the First Amendment free speech rights of publishers of the "commercial handbills." Cincinnati had argued that it "may regulate publication dispensing devices pursuant to its substantial interest in promoting safety and esthetics on or about the public right of way." *Id.* at 414. The Supreme Court found, however, that while the city had asserted a legitimate interest in the regulation, there was not "a 'reasonable fit' between its legitimate interests in safety and esthetics and its choice of a limited and selective prohibition of newsracks as the means chosen to serve those interests." *Id.* at 416. "Because the distinction

Cincinnati has drawn has absolutely no bearing on the interests it has asserted," the Court concluded "that the city has not established the 'fit' between its goals and its chosen means that is required by *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469 (1989)." *Cincinnati,* 507 U.S. at 428.

Here, the Respondents insist that there is a close fit between their interest in protecting the privacy of those persons involved in accidents which justifies prohibiting Petitioners' but *not* the press' access to accident reports. This argument must fail for the same reason that Cincinnati's justification in banning commercial handbills, but not newspapers, from its right of way did not reasonably fit the interest of improving the attractiveness of the city of Cincinnati. If the privacy of those involved in accidents were really a concern, there would be no reason to allow newspaper access to the information but deny access to those who would write letters to accident victims. Newspaper access presents a far greater potential for privacy invasion than does the prospect of the receipt of a few attorney or chiropractor solicitation letters which can be immediately tossed in the trash without even a second thought.

## CONCLUSION

Regardless of how it is characterized, the goal of the Commonwealth of Kentucky is to deny attorneys, chiropractors and others the right to engage in commercial speech because their means of speaking is unworthy in the judgment of some. But, this Court has recognized that drawing adverse distinctions based upon the purposes of proposed speech constitutes unconstitutional censorship.

With ever increasing demands to have the affairs of government open to the public, no constitutional justification exists for defining openness based upon how the government information in question will be used to speak to the public. Drawing the privacy line based upon whether public information will be made available for commercial use or for non-commercial use is plainly contrary to the First Amendment prohibition on censorship of truthful speech not to mention the Equal Protection clause's prohibition on artificial distinctions between commercial and non-commercial speech. In view of the confusing and contradictory decisions of the lower courts, the constitutional importance of the issue, and this Court's previous unsuccessful attempt to resolve the issue based on the procedural infirmities present in *United Reporting,* it is submitted that this case presents a legal question which is particularly warranting of certiorari.

Respectfully submitted,

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**330 F.3d 822**

United States Court of Appeals,
Sixth Circuit.

Stephen AMELKIN et al., Plaintiffs-Appellants,
v.
Ann McCLURE et al., Defendants-Appellees.

**No. 02-5079.**

Argued May 7, 2003.
Decided and Filed June 2, 2003.

Mary J. Lintner (briefed), Donald L. Cox (argued and briefed), Lynch, Cox, Gilman & Mahan, Louisville, KY, for Plaintiffs-Appellants.

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Before KRUPANSKY, SILER, and GILMAN, Circuit Judges.

## OPINION

GILMAN, Circuit Judge.

A number of attorneys and chiropractors filed suit to challenge the constitutionality of two Kentucky statutes

that restrict their access to accident reports filed with the Department of State Police. The district court granted summary judgment in favor of the defendants. For the reasons set forth below, we **AFFIRM** the judgment of the district court.

## I. BACKGROUND

In 1994, Kentucky amended § 189.635 of its Revised Statutes for the ostensible purpose of protecting the privacy of accident victims. Subsections (5) and (6) of the statute currently provide as follows:

> (5) All accident reports filed with the Department of State Police in compliance with subsection (4) above shall remain confidential except that the department may disclose the identity of a person involved in an accident when his identity is not otherwise known or when he denies his presence at an accident. Except as provided in subsection (7) of this section, all other accident reports required by this section, and the information contained in the reports, shall be confidential and exempt from public disclosure except when produced pursuant to a properly executed subpoena or court order, or except pursuant to subsection (6) of this section. These reports shall be made available only to the parties to the accident, the parents or guardians of a minor who is party to the accident, and the insurers of any party who is the subject of the report, or to the attorneys of the parties.
>
> (6) The report shall be made available to a news-gathering organization, solely for the purpose of publishing or broadcasting the news. The news-gathering organization shall not use or

> distribute the report, or knowingly allow its use or distribution, for a commercial purpose other than the news-gathering organization's publication or broadcasting of the information in the report. A newspaper, periodical, or radio or television station shall not be held to have used or knowingly allowed the use of the report for a commercial purpose merely because of its publication or broadcast.

Ky.Rev.Stat. Ann. § 189.635 (Michie supp.2002).

Almost immediately after § 189.635 was amended, a group of chiropractors and attorneys filed suit against Ann McClure (a custodian of accident reports at a local state police post) and an assortment of other government officials, seeking an injunction against its enforcement. In August of 1994, the district court issued a preliminary injunction to enjoin the enforcement of § 189.635 after concluding that the statute impermissibly restricted commercial speech. The defendants immediately appealed. In February of 1996, this court dissolved the preliminary injunction and remanded the case back to the district court because one of the defendants had not had an opportunity to oppose the plaintiffs' motion for injunctive relief. *Amelkin v. McClure,* No. 94-6161, 1996 WL 8112 (6th Cir. Jan.9, 1996) (*Amelkin I*).

The plaintiffs then filed a second amended complaint. Their principal new allegation was a claim that, during the time that § 189.635 had been enjoined, the defendants had applied § 61.874 of the Kentucky Revised Statutes in an unconstitutional manner. Section 61.874(3) provides in pertinent part as follows: "The public agency may prescribe a reasonable fee for making copies of nonexempt

public records requested for use for noncommercial purposes which shall not exceed the actual cost of reproduction. . . ." According to the plaintiffs, the defendants charged them between $40 and $230 per accident report during the pendency of the injunction, although before that time the copying fee was only 10 cents per page. The plaintiffs sought an injunction against the enforcement of § 61.874. In June of 1996, the district court preliminarily and permanently enjoined enforcement of both §§ 189.635 and 61.874. *Amelkin v. Comm'r, Dep't of State Police,* 936 F.Supp. 428 (W.D.Ky.1996).

The defendants appealed. This court affirmed the district court's decision to enjoin the enforcement of § 189.635, but vacated the injunction against § 61.874 and remanded for reconsideration because the district court had failed to provide any findings of fact or conclusions of law as to that section. *Amelkin v. McClure,* 168 F.3d 893 (6th Cir. 1999) (*Amelkin II*). The defendants then sought review by the Supreme Court.

After granting certiorari, the Supreme Court vacated the Sixth Circuit's decision and remanded the case for further consideration in light of *Los Angeles Police Department v. United Reporting Publishing Corp.,* 528 U.S. 32, 120 S.Ct. 483, 145 L.Ed.2d 451 (1999). In *United Reporting,* the Supreme Court held that a California statute that placed conditions on public access to the records of recent arrestees' addresses was not susceptible to a facial challenge regarding its constitutionality. This court concluded upon remand that § 189.635 was similarly not subject to a facial challenge. Accordingly, the district court's injunction against the enforcement of § 189.635 was reversed and the case remanded so that the district court could consider the plaintiffs' challenge to the statute

as applied to them. *Amelkin v. McClure,* 205 F.3d 293 (2000) (*Amelkin III*).

In June of 2001, the district court dissolved all injunctions that had previously been entered in the case. Both parties then moved for summary judgment. The district court concluded that § 189.635 did not abridge the plaintiffs' constitutional rights and that the challenge to § 61.874 was moot because the plaintiffs were not entitled to obtain copies of the accident reports at any price. It therefore awarded summary judgment in favor of the defendants. *Amelkin v. McClure,* 178 F.Supp.2d 766 (W.D.Ky.2001). This timely appeal followed.

## II. ANALYSIS

We review the district court's grant of summary judgment de novo. *Sperle v. Mich. Dep't of Corr.,* 297 F.3d 483, 490 (6th Cir.2002). Summary judgment is proper where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c).

Because both sides in the present case moved for summary judgment, "[t]here is no dispute regarding the material facts of this case; indeed, each party insists that the facts as presented to the district court require summary judgment in his or her favor." *Kincaid v. Gibson,* 236 F.3d 342, 346 (6th Cir.2001) (en banc). We may therefore assume, although we are not obligated to do so, "that there is no evidence which needs to be considered other than that which has been filed by the parties." *Id.* at 347.

As an initial matter, the defendants contend that the law of the case bars any argument that § 189.635 violates

the plaintiffs' First Amendment rights. They claim that "[t]he exact issue now argued by Appellants – whether KRS 189.635 abridges *their* freedom of speech – has already been answered in the negative by this Court." (Emphasis in original.) This contention is incorrect. The court in *Amelkin III* decided only that "§ 189.635 is . . . not subject to a facial challenge. . . . " 205 F.3d at 296. It therefore "reverse[d] and remand[ed] the case for the district court to consider the plaintiffs' as-applied challenge." *Id.*

A "facial overbreadth challenge to a statute is an exception to the traditional rule that a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court." *Los Angeles Police Dep't v. United Reporting Publ'g Corp.*, 528 U.S. 32, 39, 120 S.Ct. 483, 145 L.Ed.2d 451 (1999) (internal quotation marks omitted). *See generally* Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing,* 113 Harv. L.Rev. 1321 (2000) (identifying and evaluating the nature of "facial" and "overbreadth" challenges). This exception has two distinct aspects: it determines (1) *who* may challenge a statute, and (2) *on what grounds* a statute may be challenged.

In *United Reporting,* the information-gathering plaintiff sought to challenge the statute on the ground that it violated the rights of third parties (United Reporting's customers). Because the Supreme Court held that a facial overbreadth challenge was unavailable, the plaintiff was not the proper party to seek the statute's invalidation. United Reporting had not attempted to qualify under the statute to obtain the addresses of arrestees, 528 U.S. at

40, 120 S.Ct. 483, and it could not proceed on the theory that although the law might be constitutional as to itself, it could not be constitutionally applied to others, *id.* at 40-41, 120 S.Ct. 483.

The instant case differs in that the plaintiffs have in fact sought to obtain accident reports filed with the Department of State Police. They are thus asserting that § 189.635 violates their personal First Amendment rights. In asserting their own rights, however, the plaintiffs cannot prevail on the theory that § 189.635 curtails the rights of other parties not before the court. *Amelkin II* failed to recognize this point, and instead improperly focused on the restrictions that the statute placed upon news-gathering organizations rather than upon the plaintiffs. 168 F.3d at 897. Remand was therefore required by the Supreme Court so that both the district court and this court could decide whether the statute as applied to the plaintiffs was unconstitutional. *Amelkin III,* 205 F.3d at 296. The plaintiffs' "as applied" challenge to the constitutionality of § 189.635 thus remains to be addressed by this court. *See United Reporting,* 528 U.S. at 42, 120 S.Ct. 483 (Scalia, J., concurring) (clarifying that whether the statute was susceptible to a facial overbreadth challenge was "an entirely different question [than] whether a restriction upon access that *allows* access to the press . . . , but at the same time *denies* access to persons who wish to use the information for certain speech purposes, is in reality a restriction upon speech," and noting that the latter question "is not addressed in the Court's opinion") (emphasis in original).

We therefore turn to the merits of the constitutional challenge to § 189.635 as applied to the plaintiffs. They argue that Kentucky has sought to restrict their speech

indirectly, and that we should evaluate the statute's constitutionality by applying the principles enunciated by the Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission,* 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). *Central Hudson* sets forth a four-part test to determine the validity of restrictions on commercial speech. We are of the opinion, however, that the plaintiffs' argument is inapposite.

Section 189.635, insofar as it applies to the plaintiffs, does not restrict or even regulate expression. Rather, it simply restricts *access* to confidential information possessed by the government. Counsel for the plaintiffs contended at oral argument that § 189.635 restricts the uses to which the plaintiffs may put accident reports if and when they obtain the reports. But the statute imposes no such restriction. It prohibits *news-gathering organizations* that have obtained accident reports from using them for commercial purposes. Because this case in its present posture is not a facial challenge, however, the plaintiffs cannot prevail on the basis that the statute may be unconstitutional as applied to news-gathering organizations that have obtained accident reports. Assuming that the *plaintiffs* could obtain information regarding accident victims, the statute in question places no restriction on how they may use that information. We therefore conclude that precedent concerning government regulation of commercial speech does not provide the correct framework for analyzing this case.

On the other hand, to the extent that the defendants' argument extends beyond their contention that the law of the case controls the merits of the plaintiffs' claim, they mischaracterize § 189.635. The defendants assert that the statute is in effect a blanket prohibition on the disclosure

of accident reports, and they argue that the plaintiffs are essentially seeking an exemption to a law that otherwise applies equally to everyone. Section 189.635, however, is not a flat ban on the dissemination of accident reports by the state police. Instead, the statute permits disclosure "to the parties to the accident, the parents or guardians of a minor who is party to the accident, and the insurers of any party who is the subject of the report, or to the attorneys of the parties," as well as to "news-gathering" organizations. These exceptions refute the defendants' argument that the ban applies across the board.

Neither party, therefore, provides a persuasive analysis of the constitutionality of § 189.635. The statute is neither a direct regulation of expression nor a purely content-neutral law of general application. Because Kentucky's statute sits between these two positions, we instead consider the nature of the constitutional objections that might be raised to a statute that treats certain potential speakers more favorably than others.

Every Justice who expressed an opinion in *United Reporting* indicated that a state "could decide not to give out [accident reports] at all without violating the First Amendment." 528 U.S. at 40, 120 S.Ct. 483. But a majority of the Justices also made clear that a state "could not, for example, release [accident reports] only to those whose political views were in line with the party in power." *Id.* at 43, 120 S.Ct. 483 (Ginsburg, J., concurring); *see also id.* at 46, 120 S.Ct. 483 (Stevens, J., dissenting).

This second proposition derives from the "unconstitutional-conditions" doctrine, which "holds that government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government

may withhold that benefit altogether." Kathleen M. Sullivan, *Unconstitutional Conditions,* 102 Harv. L.Rev. 1413, 1415 (1989). For example, in *Board of County Commissioners v. Umbehr,* 518 U.S. 668, 116 S.Ct. 2342, 135 L.Ed.2d 843 (1996), which Justice Ginsburg cited in *United Reporting,* the Court held that the First Amendment prevented a county from terminating the at-will employment of an independent contractor on the basis that the county was unhappy with the political views expressed by the contractor. But § 189.635, at least as applied to the plaintiffs, does not condition the disclosure of accident reports on the nature of the recipient's speech. It therefore does not present the type of unconstitutional-conditions problem found in *Umbehr.*

The statute would also be constitutionally suspect if it had singled out a small group for unfavorable treatment based either on the content or the viewpoint of the group's speech. *See Arkansas Writers' Project, Inc. v. Ragland,* 481 U.S. 221, 229, 107 S.Ct. 1722, 95 L.Ed.2d 209 (1987) (holding a state sales tax scheme unconstitutional that taxed general-interest magazines, but exempted newspapers and religious, professional, trade, and sports magazines). If, for example, the statute provided for the disclosure of accident reports to the general public, but prohibited their disclosure to attorneys and chiropractors, this principle would be implicated. *See Legi-Tech, Inc. v. Keiper,* 766 F.2d 728, 731 (2d Cir.1985) (holding a state statute unconstitutional that permitted the general public to access a state-maintained database of pending legislation, but denied such access to "those entities which offer for sale the services of an electronic information retrieval system which contains data relating to the proceedings of the legislature").

Section 189.635, however, does not operate in this manner. It prohibits disclosure to all but news-gathering organizations and those individuals with a personal interest in the accident. At oral argument, counsel for the plaintiffs suggested that the statute grants access to accident reports to everyone except those who intend to use the reports in commercial speech. But this is simply not a plausible interpretation of § 189.635. The statute does not specifically disfavor discrete groups on content-related grounds.

In sum, applicable Supreme Court precedent does not suggest that § 189.635 offends the First Amendment rights of the plaintiffs. The statute as applied to them is therefore constitutional if it satisfies the requirements of the Equal Protection Clause. That is, § 189.635 must rationally further a legitimate state interest. *Romer v. Evans,* 517 U.S. 620, 631, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996) ("[I]f a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end.").

Plaintiffs' counsel suggested at oral argument that the court already decided this issue in *Amelkin II,* and that the law-of-the-case doctrine precludes its reconsideration here. We disagree. Although the court in *Amelkin II* did state that "[t]here is no rational basis for a statute which purports to advance the governmental interest in protecting the privacy of accident victims to allow their names and addresses to be published or broadcast to the general public," 168 F.3d at 900, this statement was made in the context of deciding whether the statute satisfied the requirements of the First Amendment for restrictions on

commercial speech. The court did not purport to address the equal-protection issue.

In any event, the Supreme Court vacated this court's judgment in *Amelkin II*. The Sixth Circuit's reasoning in the vacated decision thus does not operate as the law of the case. *See Safeco Ins. Co. of Am. v. City of White House,* 191 F.3d 675, 693 (6th Cir.1999) (holding that where the court of appeals had vacated a district court's judgment and the district court upon remand had reconsidered the issue of damages, the "law of the case" did not bar appellate review of the award of damages); *Commercial Union Ins. Co. v. Walbrook Ins. Co.,* 41 F.3d 764, 769 (1st Cir.1994) ("The doctrine of the law of the case directs that a decision of an appellate court on an issue of law, *unless vacated or set aside,* governs the issue during all subsequent stages of litigation in the *nisi prius* court and thereafter on any further appeal.") (first emphasis added; second emphasis in original).

We therefore address the merits of the equal-protection issue. Protecting the privacy of accident victims is a legitimate state interest. By limiting public disclosure of accident reports, § 189.635 rationally furthers that interest. Permitting news-gathering organizations to access the reports does not completely negate this legitimate interest. Kentucky's legislature might well have concluded that the occasional publication of information contained in an accident report because of its newsworthy nature is less invasive to the overall class of accident victims than the myriad other uses to which such reports could be put. The legislature could have easily assumed that the number of accident reports of interest to news-gathering organizations would be infinitesimal as compared to the overall number of accident reports on file. *See*

*Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 489, 75 S.Ct. 461, 99 L.Ed. 563 (1955) (holding that, absent invidious discrimination, government may further its legitimate interests incrementally).

The plaintiffs also claim that the district court erred in determining that their constitutional challenge to the application of § 61.874 was moot. They argue that if the district court's ruling on § 189.635 is reversed, they will again be subject to excessive fees for the copying of accident reports. If we had decided that § 189.635 is unconstitutional as applied to the plaintiffs, the district court on remand would have indeed needed to consider the plaintiffs' challenge to the application of § 61.874. Because the plaintiffs are not entitled to the accident reports they seek, however, the district court correctly decided that their challenge to § 61.874 is moot. *See Thompson v. Ashe,* 250 F.3d 399, 409 (6th Cir.2001) ("Because Thompson has shown no violation of his constitutional rights, the question of whether the City of Knoxville, its Mayor and Police Chief, are liable for violating plaintiffs' civil rights by enforcing the policy is moot."); *Goar v. Civiletti,* 688 F.2d 27, 29 (6th Cir.1982) (holding that, where a former prisoner alleged that his conditions of confinement were unconstitutional, "the injunctive relief sought is now moot since Goar is no longer imprisoned").

## III. CONCLUSION

For all of the reasons set forth above, we **AFFIRM** the judgment of the district court.

**178 F.Supp.2d 766**

United States District Court,
W.D. Kentucky
at Louisville.

Stephen AMELKIN, et al. Plaintiffs
v.
Ann MCCLURE, et al. Defendants

**No. CIV.A. 394CV360H.**

Dec. 20, 2001

Donald L. Cox, Mary Janice Lintner, Lynch, Cox, Gilman & Mahan, P.S.C., Louisville, KY, for Plaintiffs.

David A. Friedman, Fernandez, Friedman, Grossman & Kohn, Louisville, KY, for James W. Chambers.

Barbara Jones, Department of Corrections, Office of General Counsel, James M. Herrick, Kentucky State Police Legal Office, Frankfort, KY, for Robert F. Stephens.

D. Brent Irvin, Office of the Attorney General, Frankfort, N. Scott Lilly, Office of the Jefferson County Attorney, Paul V. Guagliardo, Thomas Lukins, City Law Department, Louisville, Deborah Shaw, Kim Quick, Arnett, Quick, Coleman & Shaw, Elizabethtown, KY, for City of Elizabethtown.

Laurence J. Zielke, Carolina George Meena, Pedley, Zielke, Gordinier, Olt & Pence, Louisville, KY, for Louisville & Jefferson County Metropolitan Sewer District.

## MEMORANDUM OPINION

HEYBURN, Chief Judge.

Plaintiffs petitioned this Court in 1994 to enjoin enforcement of K.R.S. § 189.635(5)-(6) as revised by the Kentucky General Assembly in the 1994 regular session. As amended, K.R.S. § 189.635(5) prevents the dissemination of Kentucky State Police accident reports, except to parties involved in the accident, the parents or guardians of any party who is a minor, the parties' insurers and the parties' attorneys. K.R.S. § 189.635(6) provides another exemption, making reports available to "a news-gathering organization, solely for the purpose of publishing or broadcasting the news" but not for any other "commercial purpose." Plaintiffs challenge these restrictions under the First and Fourteenth Amendments to the United States Constitution. They also challenge, on this basis, the State Police's past application of K.R.S. § 61.874, which permits public agencies to charge "a reasonable fee" for copies of public records when they are sought "for commercial purposes."

After a procedural path the parties correctly describe as "tortured," the Sixth Circuit has remanded this case for what could be a final resolution. *Amelkin v. McClure,* 205 F.3d 293 (6th Cir.), *reh'g denied,* 2000 U.S.App. LEXIS 6841, *cert. denied,* 531 U.S. 871, 121 S.Ct. 171, 148 L.Ed.2d 117 (2000). After concluding that § 189.635(5)-(6) is not subject to facial challenge, the Sixth Circuit tasked this Court with consideration of Plaintiffs' as-applied challenge to the statute. It also asked this Court to

consider whether the State Police have applied § 61.874 unconstitutionally to Plaintiffs.[1]

Plaintiff James Bogard seeks to establish a newsletter which will publish automobile accident reports. The other Plaintiffs are either chiropractors or attorneys. All Plaintiffs challenge the application of these statutes, claiming that state agencies discriminate on the basis of Plaintiffs' intended speech upon receiving the records – namely, the contact of accident victims for purposes of offering treatment or legal representation, and the publication of a newsletter which would help make such contact easier. Defendants are the State Police, the state Attorney General, Jefferson County, the Cities of Louisville and Elizabethtown, and intervenor Louisville and Jefferson County Metropolitan Sewer District ("MSD").

I.

On April 11, 1994, Governor Brereton Jones signed Senate Bill 351, which amended K.R.S. § 185.635(5)-(6) in the fashion earlier noted. Plaintiffs filed suit in June 1994, moving this Court to enjoin state agencies' enforcement of the statutes as amended before they were to go into effect on July 15, 1994. On August 2, 1994, the late Senior District Judge Charles Allen determined that the statute as amended facially violated the First Amendment and entered a preliminary injunction against its enforcement.

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[1] During the time that this Court enjoined enforcement of K.R.S. § 189.635(5)-(6), the State Police applied § 61.874 so as to substantially increase the fees for copies of reports to be used for commercial purposes.

The Sixth Circuit dissolved the injunction, noting that State Police Commissioner Jerry Lovitt had been added as a defendant only shortly before the issuance of the order and thus had not had sufficient time to oppose Plaintiffs' motion. *Amelkin v. McClure,* 1996 WL 8112, 74 F.3d 1240 (6th Cir.1996). While the injunction was in effect, the State Police discontinued their policy of withholding accident reports, but substantially raised the fees for reports when requested for a commercial purpose. Having previously charged 10 cents per page, the State Police utilized K.R.S. § 61.874 to charge $40 per non-injury report, $90 per injury report, and $230 per fatality report.

On remand, Judge Allen issued an opinion and order dated June 3, 1996, which preliminarily and permanently enjoined Defendants' enforcement of K.R.S. §§ 189.635(5)-(6) and 61.874.[2] Judge Allen noted that the Tenth and Eleventh Circuit Courts of Appeals had addressed the constitutional questions posed by statutes resembling § 189.635(5)-(6), and had reached different conclusions. *See Lanphere & Urbaniak v. Colorado,* 21 F.3d 1508 (10th Cir.), *cert. denied,* 513 U.S. 1044, 115 S.Ct. 638, 130 L.Ed.2d 544 (1994); *Speer v. Miller,* 15 F.3d 1007 (11th Cir.1994).[3] Judge

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[2] Judge Allen's order also enjoined enforcement of K.R.S. § 438.065, which prohibits any "person licensed to practice medicine, dentistry, osteopathy, podiatry, optometry, or chiropractic, or any other healing art" from soliciting patients through direct-mail, radio, or television advertising. On June 11, 2001, this Court dissolved all injunctions previously entered in this case. Plaintiffs have not sought in their motions to relitigate the constitutionality of § 438.065.

[3] The Tenth Circuit concluded in *Lanphere* that Colorado's statute – which disallowed access to criminal justice records to those who wished to use them for commercial purposes – restricted free speech, but that under the Supreme Court's test for evaluating the constitu-

(Continued on following page)

Allen based his opinion primarily upon Judge Aldisert's dissent in *Lanphere,* which had found a qualified First Amendment right to access to criminal court proceedings, including arrest records.

On February 17, 1999, the Court of Appeals affirmed Judge Allen's decision as to § 189.635(5)-(6), albeit upon different grounds. *Amelkin v. McClure,* 168 F.3d 893 (6th Cir.1999). It followed the Tenth Circuit's reasoning in *Lanphere* in determining that such a regulation implicated the First Amendment, but parted ways with the Tenth Circuit as to whether the regulation survived the four-part test in *Central Hudson, supra.* Applying that test, the Sixth Circuit determined that the speech at issue was neither illegal nor misleading, and that the government's interest in protecting accident victims' privacy was substantial. However, as to the *Central Hudson* test's third prong, the Court found that the restriction failed to directly advance the government's interest because, while it kept the information from lawyers and chiropractors, it gave the information to newspapers and broadcasters so that they might publicly report it. 168 F.3d at 898-901. As to § 61.874, the Court found that the district court had not made specific factual findings to support its injunction,

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tionality of restrictions on commercial speech set out in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n,* 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980), the statute survived constitutional challenge. 21 F.3d at 1513-16. In *Speer,* the Eleventh Circuit vacated an order dismissing a First and Fourteenth Amendment challenge to a Georgia statute substantially similar to K.R.S. § 189.635(5)-(6). On remand, the district court permanently enjoined the statute's enforcement. *Speer v. Miller,* 864 F.Supp. 1294 (N.D.Ga.1994).

and remanded that part of the decision for reconsideration. Defendants subsequently moved the Supreme Court of the United States for a writ of certiorari.

Prior to the Sixth Circuit's decision, the Supreme Court had already granted certiorari in another case raising many of the same issues. The Court ultimately decided in *Los Angeles Police Dept. v. United Reporting Publishing Corp.*, 528 U.S. 32, 120 S.Ct. 483, 145 L.Ed.2d 451 (1999), that a private publishing service whose business was providing the names and addresses of recently arrested individuals could not pose a facial challenge to a state statute which permitted access to that information only "for a scholarly, journalistic, political, or governmental purpose, or . . . for investigation purposes by a licensed private investigator." Because the respondent faced no threat of prosecution or withdrawal of federal funds, it lacked standing to challenge a law which was "not an abridgment of anyone's right to engage in speech, be it commercial or otherwise, but simply a law regulating access to information in the hands of the police department." *Id.* at 40, 120 S.Ct. 483. Even the two dissenting Justices agreed with the majority that a First Amendment analysis was inappropriate because California's law was "really a restriction on access to government information rather than a direct restriction on protected speech." *Id.* at 45, 120 S.Ct. 483 (Stevens, J., dissenting).[4]

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[4] Joined by Justice Kennedy, Justice Stevens applied rational-basis review and determined that, "[b]y allowing such widespread access to the information, the State has eviscerated any rational basis for believing [it] will truly protect the privacy" of arrestees. *Id.* at 46, 120 S.Ct. 483.

On December 13, 1999, in light of its decision in *United Reporting,* the Supreme Court granted certiorari in *Amelkin,* vacated the existing judgment and remanded to the Sixth Circuit. On February 24, 2000, the Sixth Circuit issued yet another opinion in *Amelkin,* holding that § 189.635(5)-(6) was not subject to a facial challenge and instructing this Court to consider its constitutionality as applied to Plaintiffs. The Sixth Circuit left intact its prior decision requiring this Court to make factual findings and conclusions of law as to the constitutionality of the State Police's application of § 61.874.

II.

"Traditionally, a plaintiff's burden in an as-applied challenge is different from that in a facial challenge. In an as-applied challenge, the plaintiff contends that application of the statute in the particular context in which he has acted, or in which he proposes to act, would be unconstitutional." *Women's Medical Professional Corp. v. Voinovich,* 130 F.3d 187, 193 (6th Cir.1997) (quotation, citation omitted). In other words, Plaintiffs must claim that § 189.635(5)-(6) has run afoul of the Constitution "because of the way it was applied to the particular facts of their case." *United States v. Salerno,* 481 U.S. 739, 745 n. 3, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987).

Plaintiffs characterize the statute as one which prohibits or otherwise makes impossible a constitutional right to contact accident victims by direct mail. They claim that application of the statute to them restricts their First Amendment right to speak because it makes more difficult their efforts to contact accident victims. They seem to take the view that because *United Reporting* and the Sixth

Circuit's latest opinion in this case dealt with a facial challenge, those opinions have little relevance to this as applied challenge.

The Court disagrees with Plaintiffs' characterization of this case and their view of the relevance of *United Reporting* and the latest Sixth Circuit *Amelkin* opinion. The Court believes that these opinions provide the basic road map for the Court's analysis in this case. In fact, Plaintiffs' argument, without more, runs directly contrary to Supreme Court and Sixth Circuit views of this statute. The Commonwealth of Kentucky does not tell Plaintiffs what they cannot say; it merely does not give them the privileged information which Plaintiffs would like to have in order to say what they like. In the free press context, the Supreme Court has distinguished between "the freedom of the media to *communicate* information once it is obtained . . . [and the idea] that the Constitution *compels* the government to provide the media with information or access to it on demand." *Houchins v. KQED, Inc.*, 438 U.S. 1, 98 S.Ct. 2588, 57 L.Ed.2d 553 (1978) (plurality opinion) (emphasis original). In *United Reporting*, the Supreme Court noted that it was "not a case in which the government is prohibiting a speaker from conveying information that the speaker already possesses," but rather involved "nothing more than a governmental denial of access to information in its possession." 528 U.S. at 40, 120 S.Ct. 483. On remand, the Sixth Circuit found "no material differences between K.R.S. § 189.635 and the California statute that the Supreme Court considered in *United Reporting*." 203 F.3d at 296. The Sixth Circuit reiterated that § 189.635(5)-(6) "does not restrict expressive speech, but simply regulates access to the state's accident reports."

*Id.* These opinions tell this Court a lot about deciding the issues it now confronts.

The question this Court must answer is whether Plaintiffs' as-applied challenge produces a different result than does their facial challenge. Justices Scalia and Thomas suggest that, under certain circumstances, an as-applied challenge could produce a different result. 528 U.S. at 41-42, 120 S.Ct. 483 (Scalia, J., concurring). While that is theoretically possible in every case, it does not appear actually so in this one. Most significantly, Plaintiffs do not allege any application of § 189.635(5)-(6) different from its facial terms. Nor do Plaintiffs allege any facts which could produce a different result than the facial challenge analysis. As a consequence, this Court can find no factual basis or legal reason for undertaking an analysis substantially different from that in *United Reporting* and in the last *Amelkin* opinion. Moreover, Justices Ginsburg, O'Connor, Souter and Breyer suggest that an as-applied First Amendment challenge in these circumstances fails quite simply as a matter of law. *Id.* at 42-44, 120 S.Ct. 483 (Ginsburg, J., concurring). The Court reads Chief Justice Rehnquist's opinion as essentially in agreement. Therefore, the Court concludes that K.R.S. § 189.635(5)-(6) as applied does not abridge the freedom of speech.

Because freedom of speech is not implicated here, the legislative judgment of the General Assembly should be left undisturbed "if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous." *Romer v. Evans,* 517 U.S. 620, 632, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996). Certainly, it is well settled that "the protection of potential

clients' privacy is a substantial state interest." *Edenfield v. Fane,* 507 U.S. 761, 769, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993). The Commonwealth has easily met its burden to demonstrate that § 189.635(5)-(6) advances the protection of potential clients' privacy, and accordingly, the Court must uphold it.

III.

K.R.S. § 61.874, part of the Kentucky Open Records Act, provides that agencies may impose higher fees for copies of certain public records when the copies are sought "for commercial purposes." Because the State Police may not disclose accident reports for a commercial purpose, this provision of § 61.874 does not apply to disclosure of accident reports. Plaintiffs, therefore, have no grounds for an as-applied challenge. The issue of application of § 61.874 to Plaintiffs is moot and no fact-finding is necessary.

The Court will enter an order consistent with this Memorandum Opinion.

**ORDER**

Plaintiffs and Defendants have moved for summary judgment. Being otherwise sufficiently advised,

IT IS HEREBY ORDERED that Defendants' motion is SUSTAINED, and all claims against them are DISMISSED WITH PREJUDICE.

This is a final and appealable order.

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**531 U.S. 871, 121 S.Ct. 171**

Supreme Court of the United States

Stephen AMELKIN et al., petitioners,

v.

Ann McCLURE, et al.

**No. 00-2.**

Oct. 2, 2000.

Case below, 205 F.3d 293.

Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

*RECOMMENDED FOR FULL-TEXT PUBLICATION*
Pursuant to Sixth Circuit Rule 206

ELECTRONIC CITATION: 2000 FED.
App. 0066P (6th Cir.)
File Name: 00a0066p.06

**UNITED STATES COURT OF APPEALS**

FOR THE SIXTH CIRCUIT

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| STEPHEN AMELKIN, Broadway Chiropractic; DR. BRIAN CHRISTOPHER FEE; STUART LYON; NICHOLAS BAKER; DAVID KAPLAN; JAMES W. CHAMBERS; SIDNEY HANISH; RHODA DANIELS; THOMAS H. WATSON; KENNETH W. WALL; JAMES BOGARD, doing business as Bogard & Associates, | ) | No. 96-5942 |
| *Plaintiffs-Appellees,* | ) | |
| CITY OF LOUISVILLE, Division of Police, | ) | |
| *Plaintiff,* | ) | |
| *v.* | ) | |
| ANN MCCLURE, Document Custodian; GARY ROSE, Commissioner of Department of State Police; BEN CHANDLER, Attorney General, | ) | |
| *Defendants-Appellants,* | ) | |
| JUSTICE CABINET, Department of State Police, | ) | |
| *Plaintiff/Counter Defendant-Appellant,* | ) | |
| JEFFERSON COUNTY, KENTUCKY, | ) | |
| *Defendant.* | ) | |

On Remand from the United States Supreme Court.
Nos. 94-00360, 95-00022, 95-00352 – Charles M. Allen, District Judge.

Argued: April 24, 1998

Decided and Filed: February 24, 2000

Before: SUHRHEINRICH, SILER, and GILMAN, Circuit Judges.

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## COUNSEL

**ARGUED**: William B. Pettus, OFFICE OF THE ATTORNEY GENERAL, CIVIL & ENVIRONMENTAL LAW DIVISION, Frankfort, Kentucky, Lucy B. Richardson, COMMONWEALTH OF KENTUCKY JUSTICE CABINET, GENERAL COUNSEL, Frankfort, Kentucky, for Appellants. Donald L. Cox, LYNCH, COX, GILMAN & MAHAN, Louisville, Kentucky, for Appellees. **ON BRIEF**: William B. Pettus, OFFICE OF THE ATTORNEY GENERAL, CIVIL & ENVIRONMENTAL LAW DIVISION, Frankfort, Kentucky, Lucy B. Richardson, COMMONWEALTH OF KENTUCKY JUSTICE CABINET, GENERAL COUNSEL, Frankfort, Kentucky, for Appellants. Mary J. Lintner, LYNCH, COX, GILMAN & MAHAN, Louisville, Kentucky, for Appellees. Laurence J. Zielke, PEDLEY, ZIELKE, GORDINIER, OLT & PENCE, Louisville, Kentucky, for Amicus Curiae.

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## OPINION

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RONALD LEE GILMAN, Circuit Judge. On December 13, 1999, the Supreme Court vacated our February 17,

1999 decision in the above-styled matter, *see Amelkin v. McClure*, 168 F.3d 893 (6th Cir. 1999), and remanded the case for further consideration in light of *Los Angeles Police Dep't v. United Reporting Publishing Corp.*, 528 U.S. ___, 120 S.Ct. 483 (1999). After taking into account the majority's holding in *United Reporting*, we **REVERSE** the district court's decision to enjoin the enforcement of Kentucky Revised Statute § 189.635(5)-(6), which was based upon the plaintiffs' "facial challenge" to the statute restricting access to police accident reports. We further **REMAND** the case for consideration of the plaintiffs' "as-applied" challenge to the statute. The remainder of our prior decision was not affected by the Supreme Court's action and continues to be the ruling of this court.

## I. FACTUAL SUMMARY

A number of attorneys and chiropractors, as well as the proposed publisher of a commercial newspaper to be called The Accidental Journal, filed suit to challenge two Kentucky statutes, one restricting access to police accident reports and the other allowing the state custodian of nonexempt public documents to charge commercial users "a reasonable fee" for producing copies of the reports. The district court permanently enjoined the enforcement of both statutes, finding that they violated the plaintiffs' First Amendment right to freedom of expression. On appeal, we affirmed the district court's injunction regarding KRS § 189.635 (restricting access to police accident reports), but vacated and remanded its decision regarding KRS § 61.874 (allowing fees to be charged to commercial users for copies of the reports). *See Amelkin*, 168 F.3d at 901-02.

## II. ANALYSIS

### A. The Facial Challenge to KRS § 189.635

The first issue that must be addressed is whether the plaintiffs can bring a facial challenge to KRS § 189.635, the statute that regulates access to police accident reports in Kentucky, in light of the Supreme Court's recent decision in *United Reporting*. In *United Reporting*, a private publishing company in California had been providing the names and addresses of recently arrested individuals to its customers, who included attorneys, insurance companies, drug and alcohol counselors, and driving schools. It received the names and addresses from local law enforcement agencies until the state of California amended Cal. Gov't Code § 6254(f)(3) to require that a person requesting an arrestee's name and address declare that the request is being made for one of five prescribed purposes, and that the name and address will not be used directly or indirectly to sell a product or service. United Reporting sought declaratory and injunctive relief, and requested that the amended section be declared unconstitutional under the First and Fourteenth Amendments.

The district court construed United Reporting's claim as a facial challenge to § 6254(f)(3), granted United Reporting's motion for summary judgment, and enjoined the enforcement of the statute. Upon appeal, the Ninth Circuit affirmed the district court's judgment, concluding that the statute was facially invalid. The Supreme Court, however, reversed the Ninth Circuit, and held that § 6254(f)(3) did not warrant the drastic measure of declaring facial invalidity. *See United Reporting*, 120 S.Ct. at 489.

An overbreadth facial attack is made when a challenger argues that an otherwise valid law might be

applied unconstitutionally in a specific context. *See generally United Reporting*, 120 S.Ct. at 488-89. If a facial challenge is upheld, then the state cannot enforce the statute against anyone. *See Board of Trustees v. Fox*, 492 U.S. 469, 483 (1989) ("Where an overbreadth attack is successful, the statute is obviously invalid in all of its applications, since every person to whom it is applied can defend on the basis of the same overbreadth."). On the other hand, an "as-applied" challenge consists of a challenge to the statute's application only to the party before the court. *See generally City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 758-59 (1988) (noting that as-applied challenges are reviewed on a case-by-case basis). If it is successful, the statute may not be applied to the challenger, but is otherwise enforceable. *Id.*

Overbreadth facial challenges are normally rejected because "a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court." *New York v. Ferber*, 458 U.S. 747, 767 (1982). As explained by the Supreme Court in *United States v. Salerno*, 481 U.S. 739, 745 (1987), "[a] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid."

One of the few exceptions to the presumption against facial challenges is if a statute proscribes speech and threatens violators with prosecution. *See Gooding v. Wilson*, 405 U.S. 518, 520-21 (1972). In *United Reporting*, the Supreme Court held that a facial challenge was not warranted because § 6254(f)(3) neither imposed a threat of criminal prosecution nor "chilled" expressive speech – it

simply restricted access to government information. *Id.* at 489-90.

Based on the reasoning set out in *United Reporting*, KRS § 189.635 is similarly not subject to a facial challenge because it does not carry the threat of prosecution for violating the statute and it does not restrict expressive speech, but simply regulates access to the state's accident reports. In this regard we find no material differences between KRS § 189.635 and the California statute that the Supreme Court considered in *United Reporting*. Because the district court only addressed the plaintiffs' facial challenge, as indicated by the fact that it permanently enjoined the state of Kentucky from enforcing KRS § 189.635, *see Amelkin v. McClure*, 936 F.Supp. 428 (W.D. Ky. 1996), we must reverse and remand the case for the district court to consider the plaintiffs' as-applied challenge.

**B. The Challenge to KRS § 61.874**

The district court also enjoined the enforcement of KRS § 61.874, the statute that allows the state custodian of nonexempt public documents to charge commercial users for producing copies of police accident reports. It did so without making specific findings regarding the four factors that are used in determining whether a preliminary injunction should be granted. *See Washington v. Reno*, 35 F.3d 1093, 1099 (6th Cir. 1994). Without the benefit of such factual findings, it is impossible for us to judge the validity of the plaintiffs' arguments. Accordingly, our prior opinion vacated and remanded the case back to the district court to make findings of fact and conclusions of law as to how KRS § 61.874 has been applied by the

state agency. *See Amelkin*, 168 F.3d at 901-02. This portion of our prior opinion was not modified by *United Reporting*, and continues to be the ruling of this court.

## III. CONCLUSION

For the reasons set forth above, the district court's decision regarding KRS § 189.635 is **REVERSED** and **REMANDED** for consideration of the plaintiffs' as-applied challenge, and its decision regarding KRS § 61.874 is **VACATED** and **REMANDED**, all for further proceedings consistent with this opinion.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

December 13, 1999

Mr. Donald L. Cox
500 Meidinger Tower
462 South Fourth Street
Louisville, KY 40202

Re: Ann McClure, Document Custodian, et al. v. Stephen Amelkin, Broadway Chiropractic, et al. No. 99-200

Dear Mr. Cox:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Sixth Circuit for further consideration in light of Los Angeles Police Dept. v. United Reporting Publishing Corp., 528 U.S. ___ (1999).

Sincerely,

/s/ William K. Suter
William K. Suter, Clerk

**Stephen AMELKIN, Broadway Chiropractic; Dr. Brian Christopher Fee; Stuart Lyon; Nicolas Baker; David Kaplan; James W. Chambers; Sidney Hanish; Rhoda Daniels; Thomas H. Watson; Kenneth W. Wall; James Bogard, doing business as Bogard & Associates, Plaintiffs-Appellees, City of Louisville, Division of Police, Plaintiff,**

**v.**

**Ann McCLURE, Document Custodian; Gary Rose, Commissioner of Department of State Police; Ben Chandler, Attorney General, Defendants-Appellants, Justice Cabinet, Department of State Police, Plaintiff/Counter Defendant-Appellant, Jefferson County, Kentucky, Defendant.**

**No. 96-5942.**

United States Court of Appeals,
Sixth Circuit.

Argued April 24, 1998.

Decided Feb. 17, 1999.

Rehearing and Suggestion for Rehearing En Banc Denied April 30, 1999.

Mary J. Lintner (briefed), Donald L. Cox (argued), Lynch, Cox, Gilman & Mahan, Louisville, KY, for Plaintiffs-Appellees.

Denise M. Smith (briefed), Benesch, Friedlander, Coplan & Aronoff, Cincinnati, OH, Laurence J. Zielke (briefed), Pedley, Zielke, Gordinier, Olt & Pence, Louisville, KY, for Plaintiff-Appellant Justice Cabinet.

Steve Durham, Office of the General Counsel, Corrections Cabinet, William B. Pettus, Asst. Atty. Gen. (argued

and briefed), Office of the Attorney General, Civil & Environmental Law Division, Frankfort, KY, for Defendant-Appellant Ann McClure and Ben Chandler.

Steve Durham, Office of the General Counsel, Corrections Cabinet, Lucy B. Richardson (argued and briefed), Commonwealth of Kentucky, Justice Cabinet, General Counsel, William B. Pettus, Asst. Atty. Gen., Office of the Attorney General, Civil & Environmental Law Division, Frankfort, KY, for Defendant-Appellant Gary Rose and Justice Cabinet.

Before: SUHRHEINRICH, SILER, and GILMAN, Circuit Judges.

GILMAN, J., delivered the opinion of the court, in which SUHRHEINRICH, J., joined. SILER, J. (pp. 902-03), delivered a separate opinion concurring in part and dissenting in part.

## OPINION

GILMAN, Circuit Judge.

A number of attorneys and chiropractors, as well as the proposed publisher of a commercial newspaper to be called The Accidental Journal, filed suit to challenge two Kentucky statutes, one restricting the disbursement of accident reports and the other allowing the state custodian of nonexempt public documents to charge commercial users "a reasonable fee" for producing copies of the reports. The district court permanently enjoined the enforcement of both statutes, finding that they violated the plaintiffs' First Amendment right to freedom of expression. For the reasons set forth below, we AFFIRM the portion of the district court's injunction relating to the amendments

restricting the disbursement of accident reports, but VACATE AND REMAND for further proceedings the portion of the district court's order enjoining the amendments that allow the charging of reasonable fees for copying nonexempt public documents.

## I. BACKGROUND

Until 1994, Kentucky Revised Statutes § 189.635(5) provided that "all accident reports filed with the Department of State Police . . . shall remain confidential." Despite the all-encompassing nature of the statutory language, a Kentucky Attorney General's Opinion issued in 1989 determined that the privacy exemption under Kentucky's Open Records Law was "discretionary." This had the effect of making all accident reports accessible to the public. Accident reports soon became a prime source for attorneys and chiropractors in Kentucky to identify prospective clients. As one chiropractor noted: "In order to determine what potential patients would be in need of chiropractic services, I have routinely submitted open records requests to various law enforcement agencies in order to obtain copies of accident reports."

Such accident reports contain the name, address, and driver's license number of those involved in the accident, and a diagram and brief description of the accident itself. After procuring these reports, certain attorneys and chiropractors would use the information contained therein to contact victims and offer their services, often attaching the accompanying accident report to the solicitation letter. Plaintiff James Bogard has in the past made a business out of assisting these attorneys and chiropractors by supplying them with the accident reports that he has

obtained from law enforcement agencies. Bogard also intends to publish a newspaper, The Accidental Journal, that will contain copies of accident reports and that will be marketed primarily to attorneys and chiropractors.

The efforts to solicit potential clients through the procurement and use of accident reports became so incessant that those involved in traffic accidents immediately began receiving large stacks of direct mail solicitations from various attorneys and chiropractors. A typical example of such a mailing is reproduced below:

> Public records indicate you were involved in an automobile accident recently. You may have been injured at the time of the accident. Often times a person finds there was an injury a day or so after the accident. Sometimes a person is stunned or has a surge of adrenaline that masks the symptoms of injury at the time the accident report is made. If you find that you did suffer personal injury due to the automobile accident, I can help you.
>
> For over thirty years I have been representing people like you against insurance companies. I have the knowledge, the expertise, and most of all, the practical wisdom to guide you.
>
> You are not expected to know the usual or unusual methods that insurance representatives use on injured persons. Do not be misled, misinformed or fall prey to an easy settlement from the insurance company. KNOW YOUR LEGAL RIGHTS.
>
> Protect yourself. Get information from a lawyer. You have one body and it has to serve you your whole life. Make sure you receive the right medical treatment you need.

> Just as you expect your doctor to give the proper medical treatment, so should you have an attorney to see that your legal rights are protected. By going to an experienced lawyer you can have the peace of mind that you will be protected and your claim will be well represented.

Not long after the Attorney General's Opinion was issued in 1989, a public groundswell developed against the release of accident reports to attorneys and chiropractors. One editorial described the attorneys who used such accident reports as "greedy, money grubbing lawyers" who seemed "to prey on the misfortunes of others." Ky. Bench & Bar, Summer 1993, at 7. In addition to the solicitations tarnishing the image of the legal community in the eyes of the public, some who received a mailbox full of such letters grew concerned over their personal privacy and safety. One recipient of such direct mail solicitation related his experience as follows:

On April 1, 1993 I was involved in an automobile collision wherein my vehicle was struck in the rear. I was transported to the hospital and was treated for injuries for which I have now recovered.

Shortly after the collision I received via U.S. Mail the following:

1. Solicitation letter from Attorney [A] and a complimentary copy of the police report with his advertisement on the reverse side.

2. Solicitation letter from Attorney [B] and a complimentary copy of the police report.

3. Solicitation letter from Attorney [C].

4. Solicitation letter from Attorney [D].

> I additionally received solicitations from various chiropractors but failed to retain that information since it was so voluminous.
>
> Ms. Richardson, if it was my desire to engage the services of an attorney I would do so using my own resources to make such a selection. In addition, I feel that this is a direct infringement upon my right of privacy. It is my desire and constitutional right to maintain privacy. Publicly revealing my home address is unconscionable and unacceptable and a personal affront to my rights.
>
> My occupation is such that it is mandatory that my home address remain confidential. The promulgation of same may place myself as well as my family in danger of physical harm.

(Emphasis in original).

In an attempt to protect accident victims from being hounded by unwanted solicitations from attorneys and chiropractors, the Kentucky general assembly amended § 189.635 and § 61.874 of the Kentucky Revised Statutes in 1994. The relevant text of the amended statutes is reproduced below:

> 189.635 VEHICLE ACCIDENT REPORTS BY OPERATORS LAW ENFORCEMENT OFFICERS AND AGENCIES – AVAILABILITY TO PARTIES TO ACCIDENT AND NEWSGATHERING ORGANIZATIONS.
>
> . . . .
>
> (5) All accident reports filed with the Department of State Police in compliance with subsection (4) above shall remain confidential except that the department may disclose the identity of a person involved in an accident when his

identity is not otherwise known or when he denies his presence at an accident. All other accident reports required by this section, and the information contained in the reports, shall be confidential and exempt from public disclosure except when produced pursuant to a properly executed subpoena or court order, or except pursuant to subsection (6) of this section. These reports shall be made available only to the parties to the accident, the parents or guardians of a minor who is party to the accident, and the insurers of any party who is the subject of the report, or to the attorneys of the parties.

(6) The report shall be made available to a news-gathering organization, solely for the purpose of publishing or broadcasting the news. The news-gathering organization shall not use or distribute the report, or knowingly allow its use or distribution, for a commercial purpose other than the news-gathering organization's publication or broadcasting of the information in the report. A newspaper, periodical, or radio or television station shall not be held to have used or knowingly allowed the use of the report for a commercial purpose merely because of its publication or broadcast.

Ky.Rev.Stat. Ann, § 189.635 (Banks-Baldwin 1995).

61.874. ABSTRACTS, MEMORANDA, COPIES – AGENCY MAY PROSCRIBE FEE

. . . .

(3) The public agency may prescribe a reasonable fee for making copies of nonexempt public records requested for use for noncommercial purposes which shall not exceed the actual cost

> of reproduction, including the costs of the media and any mechanical processing cost incurred by the public agency, but not including the cost of staff required. . . .
>
> (4)(a) Unless an enactment of the General Assembly prohibits the disclosure of public records to persons who intend to use them for commercial purposes, if copies of nonexempt public records are requested for commercial purposes, the public agency may establish a reasonable fee.
>
> (b) The public agency from which copies of nonexempt public records are requested for a commercial purpose may require a certified statement from the requestor stating the commercial purpose for which they shall be used, and may require the requestor to enter into a contract with the agency. The contract shall permit use of the public records for the stated commercial purpose for a specified fee.
>
> (c) The fee provided for in subsection (a) of this section may be based on one or both of the following: 1. Cost to the public agency of media, mechanical processing, and staff required to produce a copy of the public record or records; 2. Cost to the public agency of the creation, purchase, or other acquisition of the public records.
>
> Ky.Rev.Stat. Ann, § 61.874 (Banks-Baldwin 1997).

Governor Brereton Jones later stated that he signed the amendments to Kentucky's Open Records Law to "provide [ ] a measure of protection to accident victims" by "prohibit[ing] distribution [of accident reports] for commercial purposes."

Almost immediately after passage, the plaintiffs filed suit against Ann McClure (a custodian of accident reports at a local state police post) and an assortment of other government officials, all in an effort to enjoin enforcement of the statutes. They claimed that the statutes infringe on their First Amendment right to freedom of expression. Following a lengthy hearing, the district court permanently enjoined the enforcement of both statutes, holding that they violated the First Amendment. This timely appeal followed.

## II. ANALYSIS

### A. The Challenge to § 189.635

The defendants contend that all § 189.635 does is limit the category of people who have access to accident reports. In the defendants' brief, they assert that the statute does not "even hint at . . . or place unconstitutional conditions on the use of this accessed material by restricting speech related purposes." Because § 189.635 is purportedly a "pure denial of access statute," they claim that it is constitutional under the Supreme Court's decision in *Houchins v. KQED, Inc.*, 438 U.S. 1, 98 S.Ct. 2588, 57 L.Ed.2d 553 (1978), where the Court noted that the First Amendment does not "guarantee . . . a right of access to all sources of information within government control." *Id.* at 9, 98 S.Ct. 2588. Section 189.635, however, is not as benign as the defendants would have us believe.

Subsection 6 of § 189.635 clearly restricts a "newsgathering organization" from using or distributing any accident report that it obtains for a commercial purpose, other than to publish or broadcast the information in a news report. It is this content-based restriction with

respect to news organizations which makes § 189.635 fatally flawed.

In *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980), the Supreme Court articulated a four-part test to analyze the constitutionality of government regulations limiting commercial speech:

> At the outset, we must determine [1] whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask [2] whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine [3] whether the regulation directly advances the governmental interest asserted, and [4] whether it is not more extensive than is necessary to serve that interest.

*Id.* at 566, 100 S.Ct. 2343 (Enumeration added).

1. Protected Expression

The parties agree that the speech at issue is neither illegal nor misleading under the first prong of the *Central Hudson* test. Rather, their dispute centers around the remaining three prongs.

2. Governmental Interest

The defendants argue that the governmental interest behind § 189.635 is to protect accident victims' privacy and safety by keeping the personal information contained in such reports out of the hands of the general public. We are persuaded that such an interest is substantial, as

evidenced by the fact that a number of other courts that have considered similar statutes have reached the same conclusion. *See Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 115 S.Ct. 2371, 132 L.Ed.2d 541 (1995); *Lanphere & Urbaniak v. Colorado*, 21 F.3d 1508 (10th Cir.1994); *Speer v. Miller*, 864 F.Supp. 1294 (N.D.Ga.1994); *cf. Kallstrom v. City of Columbus*, 136 F.3d 1055 (6th Cir.1998) (holding that disclosure of information contained in undercover officers' personnel files violated the officers' privacy interest in preserving their lives and personal security); *United Reporting Publishing Corp. v. California Highway Patrol*, 146 F.3d 1133 (9th Cir.1998) (holding that government's asserted interest in protecting the privacy of arrestees is substantial under *Central Hudson*).

As the Supreme Court has noted: "The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society." *Carey v. Brown*, 447 U.S. 455, 471, 100 S.Ct. 2286, 65 L.Ed.2d 263 (1980). Indeed, "[the Supreme Court's] precedents . . . leave no room for doubt that the protection of potential clients' privacy is a substantial state interest." *Went For It*, 515 U.S. at 625, 115 S.Ct. 2371 (internal quotation marks omitted). The Court has also "noted that 'a special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions.'" *Id.* (quoting *Frisby v. Schultz*, 487 U.S. 474, 484-85, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988)). From this abundance of legal authority, we hold that the government's asserted interest in protecting the privacy and safety of accident victims is substantial and, hence, meets the second prong of the *Central Hudson* test.

3. Advancement of Governmental Interest

Concluding that the government's asserted interest is substantial, however, does not end our inquiry, but requires that we examine the next prong of the *Central Hudson* test – whether the challenged governmental regulation "advances the Government's interest 'in a direct and material way.'" *Rubin v. Coors Brewing*, 514 U.S. 476, 487, 115 S.Ct. 1585, 131 L.Ed.2d 532 (1995) (quoting *Edenfield v. Fane*, 507 U.S. 761, 767, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993)). The defendants, as the "party seeking to uphold [the] restriction on commercial speech," have the burden of justifying the restriction. *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 71 n. 20, 103 S.Ct. 2875, 77 L.Ed.2d 469 (1983). This burden may not be satisfied by "mere speculation or conjecture." *Edenfield*, 507 U.S. at 770, 113 S.Ct. 1792. Instead, "'a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.'" *Coors Brewing*, 514 U.S. at 487, 115 S.Ct. 1585 (quoting *Edenfield*, 507 U.S. at 770, 113 S.Ct. 1792). When the regulation only provides ineffective or remote support for the government's purpose, it does not withstand constitutional scrutiny. *See Edenfield*, 507 U.S. at 770, 113 S.Ct. 1792.

The district court found that the amended statute does not directly and materially advance the government's interest in protecting the privacy and safety of accident victims. Specifically, the district court noted that "the fact that this information is available to the media and insurers is sufficient to warrant the holding that the privacy interest which the State asserts in defense of the statute is not protected by the restriction of the public records to

newspapers and insurers." *Amelkin v. Commissioner*, 936 F.Supp. 428, 431 (W.D.Ky.1996). The defendants claim that the district court erred in so finding, arguing that a prohibition against the release of accident victims information (1) reduces the opportunity for criminals to misuse such information, either by stalking accident victims or by using the information contained therein to defraud such victims, and (2) serves to prevent the direct and unnecessary intrusion into the private lives and homes of accident victims and their families.

As to the first argument, the defendants have provided no evidence, aside from general averments contained in affidavits, that would support the contention that criminals would use accident reports to harass or further harm accident victims if they had access to the information contained in such reports. The personal information contained in accident reports was in fact available to the general public prior to the amendment of § 189.635, without any evidence of adverse consequences. For example, the same type of personal information found in accident reports could also be gathered by requesting from the department of motor vehicles information contained on a driver's license. This asserted harm, therefore, appears to be nothing more than the type of speculation and conjecture that is insufficient to sustain a restriction on commercial speech. *See Coors Brewing*, 514 U.S. at 487, 115 S.Ct. 1585. Because the defendants have failed to sustain their burden of proving that this harm is real, we need not consider whether the restriction will alleviate the asserted harm to a material degree. *See id.*

Unlike the defendants' first argument, their second argument in support of the statute – to prevent the direct and unnecessary intrusion into the private lives and

homes of accident victims – is at least directly and materially linked to the restriction on access to accident reports. The problem, however, is that the statutory exceptions serve to neutralize the government's attempts to protect the privacy of accident victims. The district court in fact rejected the contention that § 189.635 materially advances the governmental interest in protecting the privacy of accident victims on the very grounds that such an interest is undermined by the exceptions provided for in the statute, particularly the provision allowing accident reports to be obtained and published by news-gathering organizations. *See Amelkin*, 936 F.Supp. at 431. In this respect, § 189.635 "does not restrict all (or probably even most) possible invasions of a person's privacy." *United Reporting*, 146 F.3d at 1139. The fact that newspapers may inspect and report on the information contained in accident reports belies the defendants' claim that the statute is actually intended to protect the privacy interests of accident victims. *See Amelkin*, 936 F.Supp. at 431.

The exception to § 189.635(5) for news-gathering organizations precludes the statute from directly and materially advancing the government's purported privacy interest. *See Valley Broadcasting Co. v. United States*, 107 F.3d 1328, 1334 (9th Cir.1997). Our conclusion is reinforced by the holding in *Coors Brewing*, 514 U.S. at 476, 115 S.Ct. 1585, where the Supreme Court determined that 27 U.S.C. § 205(e)(2), which prohibited brewers from disclosing the alcohol content of beer on their labels, violated the First Amendment. The Court held that the government's asserted interest in avoiding alcohol "strength wars" was substantial, but that § 205(e)(2) did not directly advance that interest "because of the overall irrationality of the Government's regulatory scheme." *Id.*

at 488, 115 S.Ct. 1585. The regulatory scheme was irrational because of the numerous exceptions Congress appended to § 205(e)(2), including an exception for wines and distilled spirits, which were allowed to list alcohol content on their labels, and the failure to extend the ban on disclosing alcohol content to advertisements. *See id.* As the Court observed, "[t]here is little chance that [the regulation at issue] can directly and materially advance its aim, while other provisions of the same act directly undermine and counteract its effects." *Id.* at 489, 115 S.Ct. 1585.

For the same reasons, the exception to § 189.635(5) for news-gathering organizations renders the statute unconstitutional under the First Amendment. There is no rational basis for a statute which purports to advance the governmental interest in protecting the privacy of accident victims to allow their names and addresses to be published or broadcast to the general public. "Having one's name . . . and address printed in the local paper is a far greater affront to privacy than receiving a letter from an attorney . . . eager to help one overcome his present difficulties (for a fee, naturally)." *United Reporting*, 146 F.3d at 1140. The exceptions to § 189.635 "undermine and counteract" the asserted governmental interest in preserving privacy just as surely as did the exceptions in *Coors Brewing*. We therefore conclude that § 189.635(6) fails to satisfy the third prong of *Central Hudson*.

The defendants, however, seek to re-characterize the nature of the affront to accident victims' privacy as being the receipt, often voluminous, of direct mail solicitations from lawyers and chiropractors. But the invasion of an accident victim's privacy does not stem from the victim's mailbox being stuffed by direct mail solicitations from

attorneys and chiropractors. If such were the case, then most of us would feel no sense of privacy because of the seemingly unstoppable torrent of junk mail which flows into most citizens' mailboxes. Instead, the true affront to a person's privacy comes from the "solicitor's discovery of the information [contained in the accident report] that led to the solicitation." *United Reporting*, 146 F.3d at 1139; *see Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 476, 108 S.Ct. 1916, 100 L.Ed.2d 475 (1988) ("The [privacy] invasion, if any, occurs when the lawyer discovers the recipient's legal affairs, not when he confronts the recipient with the discovery [through a targeted direct-mail solicitation].").

As one district court has noted: "It is hard to see how direct mail solicitations invade the privacy of [individuals]. If they don't like the solicitation, they can simply throw it away." *United Reporting Publishing Corp. v. Lungren*, 946 F.Supp. 822, 828 (S.D.Cal.1996); *see also Bolger*, 463 U.S. at 72, 103 S.Ct. 2875 ("Consequently, the short, though regular journey from the mail box to the trash can . . . is an acceptable burden, at least so far as the Constitution is concerned." (internal quotation marks omitted)). Instead, the true motivation behind § 189.635 appears to be directed at preventing attorneys and chiropractors from looking at accident reports, with the secondary consequence that direct mail solicitation practices would be curtailed.

The defendants also claim that the district court erred in not following the Tenth Circuit's decision in *Lanphere & Urbaniak*, 21 F.3d at 1508, which reviewed a similar statute. In that case, the Tenth Circuit held that it had "no trouble" finding that the state's interest in protecting privacy was directly advanced by the statute in question.

*Id.* at 1515. The Tenth Circuit failed, however, to provide any reasoning for why it had "no trouble" reaching this conclusion. Instead, the court simply asserted:

> The State's interest in protecting privacy is directly advanced when the State no longer allows access to the names and addresses of those charged with misdemeanor traffic violations and [Driving Under the Influence]. Further, refusing access to such information reasonably directly advances the State's interest in lessening the danger of overreaching by solicitors where potential solicitation recipients may be particularly vulnerable.

*Id.*

We agree with the district court's decision not to follow *Lanphere*. As the Ninth Circuit recently observed: "*Lanphere* fails to take into account the Supreme Court's decision in *Edenfield*, 507 U.S. at 767, 113 S.Ct. 1792 (holding that the third prong of *Central Hudson* requires the challenged regulation to advance the state interests 'in a direct and material way,' not merely a direct or 'reasonably' direct way), and is in conflict with *Coors Brewing*, 514 U.S. 476, 115 S.Ct. 1585." *United Reporting*, 146 F.3d at 1139 n. 4.

Finally, the defendants claim that the statute still advances the interest of protecting the privacy of accident victims because state agencies are required to redact certain personal and private information from any accident report that is provided. The defendants rely on Kentucky Revised Statutes § 61.878(1)(a), which is part of Kentucky's Open Records Law. Nothing in this statute, however, requires that state agencies redact such information from accident reports. Section 61.878(1)(a) only

provides that "public records" are excluded from the provisions of Kentucky's Open Records Law if they contain "information of a personal nature" and its release would cause "a clearly unwarranted invasion of personal privacy." There is nothing in the statutory language compelling the custodian of accident records to redact such personal information before providing the report to news-gathering organizations. That a custodian may choose to do so is obviously not sufficient to cure a constitutional infirmity.

4. Restriction on Commercial Speech More Extensive Than Necessary

Because we conclude that § 189.635(6) does not directly advance the asserted governmental interest, there is no need for us to consider the final prong of *Central Hudson* (whether the restriction on commercial speech is more extensive than necessary to advance such interest).

B. Severability

Having concluded that § 189.635(6) violates the First Amendment, we must next determine whether that portion of the statute may be severed without requiring that § 189.635(5) be similarly struck down.

Kentucky's general severability statute, § 446.090, provides as follows:

> It shall be considered that it is the intent of the General Assembly, in enacting any statute, that if any part of the statute be held unconstitutional the remaining parts shall remain in force, . . . unless the remaining parts are so essentially and inseparably connected with and dependent upon

> the unconstitutional part that it is apparent that the General Assembly would not have enacted the remaining parts without the unconstitutional part, or unless the remaining parts, standing alone, are incomplete and incapable of being executed in accordance with the intent of the General Assembly.

Ky.Rev.Stat. Ann, § 446.090 (Banks-Baldwin 1993).

As noted earlier, the motivating purpose behind the passage of § 189.635(5)-(6) was apparently to protect the privacy of accident victims from having their accident reports inspected by attorneys and chiropractors who desire to solicit their business. Without § 189.635(6), news-gathering organizations would have no access at all to accident reports. Given the clear public interest in having a general awareness of accidents taking place within the community, we believe "it is apparent that the general assembly would not have enacted the remaining parts without the unconstitutional part." Ky.Rev.Stat. § 446.090. Because retaining § 189.635(5) alone would be contrary to the legislature's intent in passing the amendments to § 189.635(5)-(6), we find that the one cannot be severed from the other. Accordingly, § 189.635(5), given its inextricable links to § 189.635(6), must also fall.

C. The Challenge to § 61.874

This particular case has made a number of trips to our court, each time resulting in it being remanded to the district court because of a procedural irregularity or other infirmity. Unfortunately, a portion of the district court's opinion in this appeal has a similar flaw – it fails to provide any findings of fact or conclusions of law with respect to the "as applied" challenge to § 61.874. The

plaintiffs contend that the agency responsible for implementing § 61.874 has applied the "reasonable fee" provision in an arbitrary and discriminatory manner insofar as commercial users are concerned. Their brief alleges that "the Commonwealth increased the cost of the reports from 10 cents per page to $40 per report for non-injury accidents; $90 per report for injury accidents; and $230 per report for fatal accident reports. The Commonwealth proposed to charge Appellee Lyon $17,650 for two weeks of reports, which previously would have cost him about $68."

While the district court enjoined the enforcement of § 61.874, it did so without making specific findings regarding the following four factors as set forth in *Washington v. Reno*, 35 F.3d 1093 (6th Cir.1994):

> The factors to be considered by a district court in deciding whether to grant a preliminary injunction are well established in this circuit. In making that determination a court must consider: (1) the likelihood that the party seeking the preliminary injunction will succeed on the merits of the claim; (2) whether the party seeking the injunction will suffer irreparable harm without the grant of the extraordinary relief; (3) the probability that granting the injunction will cause substantial harm to others; and (4) whether the public interest is advanced by the issuance of the injunction.

*Id.* at 1099.

Without the benefit of such factual findings, it is impossible for us to judge the validity of the plaintiffs' arguments. As this court stated in *Six Clinics Holding Corp., II v. Cafcomp Systems, Inc.*: "A district court is required to make specific findings concerning each of the

four factors, unless fewer factors are dispositive of the issue." 119 F.3d 393, 399 (6th Cir.1997). In this case, the district court did not make a specific finding with respect to any of the factors enumerated above. Although the plaintiffs cite examples of the allegedly arbitrary and capricious manner in which the agency has charged fees since the enactment of the statute, no such findings are in the record before us.

Accordingly, we vacate and remand the case back to the district court to make findings of fact and conclusions of law with regard to how § 61.874 has been applied by the state agency. In so doing, we suggest that the court particularly focus on the "creation" language in § 61.874(4)(c)(2). The agency could potentially be using this language to charge commercial users not only for the compilation, storage, and upkeep of such records by the agency itself, but also for the state's investigative and personnel costs that went into "creating" the record. In other words, the agency might be utilizing the "creation" language as a basis to charge more than the agency's marginal or even average cost in producing the records. Instead, the agency might be using this language to recoup the state's costs for law enforcement's investigation that backs up to the creation of accident reports. Any such interpretation of the statute might well be an arbitrary and capricious application sufficient to demonstrate that it is unconstitutional as applied.

## III. CONCLUSION

Having concluded that Kentucky Revised Statute § 189.635(6) violates part three of the *Central Hudson* test, we AFFIRM the district court's decision to enjoin the

enforcement of § 189.635(5)-(6) as an unconstitutional infringement on the First Amendment right to freedom of expression. With respect to Kentucky Revised Statute § 61.874, however, the district court's failure to provide any findings of fact or conclusions of law requires that its decision to enjoin § 61.874 be VACATED and REMANDED for further proceedings consistent with this opinion.

SILER, Circuit Judge, concurring in part and dissenting in part.

I respectfully dissent, for I believe that the decision of the district court should be reversed entirely. Therefore, I concur in Part II.C. of the majority opinion where it vacates and remands the district court's decision concerning the challenge to Ky.Rev.Stat. § 61.874. I also concur in Part II.B. (severability), finding that if Ky.Rev.Stat. § 189.635(6) is unconstitutional, then the whole statute is unconstitutional. Nevertheless, because I would find that Ky.Rev.Stat. § 189.635(6) is not unconstitutional, the severability portion is not applicable to my opinion.

Initially, there is no general First Amendment right for the public to access criminal justice records. *Lanphere & Urbaniak v. Colorado*, 21 F.3d 1508, 1512 (10th Cir.1994). The majority is correct in analyzing the statute under the test from *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 566, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). The majority, however, has stopped at the third prong from *Central Hudson*, finding that the regulation does not directly advance the governmental interest asserted.

Agreeing with the majority, I question whether the Commonwealth of Kentucky has shown that the prohibition against the release of the accident victims information

reduces the opportunity for criminals to misuse such information, for there seems to be little evidence about that. However, the prohibition certainly serves to prevent the direct and unnecessary intrusion into the private lives and homes of accident victims and their families. Obviously, the attorneys and insurance carriers for the persons involved in the accident should have access to this information, for they are all representatives of the persons involved. In addition, the Commonwealth has allowed the news media to obtain this information for noncommercial use, that is, for news reports. Although this, to some degree, intrudes into the private lives and homes of the victims, it intrudes much less than publication in a commercial pamphlet intended to aid attorneys and chiropractors in soliciting the victims.

Although the majority finds *United Reporting Publishing Corp. v. California Highway Patrol*, 146 F.3d 1133 (9th Cir.1998), more persuasive than the decision in *Lanphere*, I believe *Lanphere* is more persuasive. Therefore, I would follow *Lanphere* and find that the Commonwealth has a substantial interest in the case and that the statute advances those interests in a reasonably direct way. Finally, I would find that the statute effects a reasonable fit under the framework of *Central Hudson*.

## AMENDMENTS TO THE UNITED STATES CONSTITUTION

## AMENDMENTS BILL OF RIGHTS

### AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

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### AMENDMENT XIV

**Section 1: Citizenship; Due process; Equal Protection**

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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[LOGO]

**GENERAL ASSEMBLY**
**COMMONWEALTH OF KENTUCKY**

**REGULAR SESSION 1994**

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SENATE BILL NO. 351

(AS ENACTED)

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WEDNESDAY, MARCH 30, 1994

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AN ACT relating to motor vehicle accidents.

*Be it enacted by the General Assembly of the Commonwealth of Kentucky:*

Section 1 KRS 189.635 is amended to read as follows:

(1) The Justice Cabinet, Department of State Police, shall be responsible for maintaining a reporting system for all vehicle accidents which occur within the Commonwealth. Such accident reports shall be utilized for such purposes as will improve the traffic safety program in the Commonwealth involving the collection, processing, storing, and dissemination of such data and the establishment of procedures by administrative regulations to insure that uniform definitions, classifications, and other federal requirements are in compliance.

(2) Any person operating a vehicle on the highways of this state who is involved in an accident resulting in fatal or nonfatal personal injury to any person or damage to the vehicle rendering the vehicle inoperable shall be required to immediately notify a law enforcement officer having jurisdiction. In the event the

operator fails to notify or is incapable of notifying a law enforcement officer having jurisdiction, such responsibility shall rest with the owner of the vehicle or any occupant of the vehicle at the time of the accident. A law enforcement officer having jurisdiction shall investigate the accident and file a written report of the accident with his law enforcement agency.

(3) Every law enforcement agency whose officers investigate a vehicle accident of which a report must be made as required in this chapter shall file a report of the accident with the Department of State Police within ten (10) days after investigation of the accident upon forms supplied by the department.

(4) Any person operating a vehicle on the highways of this state who is involved in an accident resulting in any property damage exceeding five hundred dollars ($500) in which an investigation is not conducted by a law enforcement officer shall file a written report of the accident with the Department of State Police within ten (10) days of occurrence of the accident upon forms provided by the department.

(5) All accident reports filed with the Department of State Police in compliance with subsection (4) above shall remain confidential except that the department may disclose the identity of a person involved in an accident when his identity is not otherwise known or when he denies his presence at an accident. ***All other accident reports required by this section, and the information contained in the reports, shall be confidential and exempt from public disclosure except when produced pursuant to a properly executed subpoena or court order, or except pursuant to subsection (6) of this section. These reports shall be made available only to the parties to the accident, the parents or guardians of a minor who is party to the accident and the***

***insurers of any party who is the subject of the report, or to the attorneys of the parties.***

*(6)* ***The report shall be made available to a news-gathering organization, solely for the purpose of publishing or broadcasting the news. The news-gathering organization shall not use or distribute the report, or knowingly allow its use or distribution, for a commercial purpose other than the news-gathering organization's publication or broadcasting of the information in the report. A newspaper, periodical, or radio or television station shall not be held to have used or knowingly allowed the use of the report for a commercial purpose merely because of its publication or broadcast.***

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**61.870. Definitions for KRS 61.872 to 61.884.**

As used in KRS *61.872* to *61.884*, unless the context requires otherwise:

(1) "Public agency" means:

(a) Every state or local government officer;

(b) Every state or local government department, division, bureau, board, commission, and authority;

(c) Every state or local legislative board, commission, committee, and officer;

(d) Every county and city governing body, council, school district board, special district board, and municipal corporation;

(e) Every state or local court or judicial agency;

(f) Every state or local government agency, including the policy-making board of an institution of education, created by or pursuant to state or local statute, executive order, ordinance, resolution, or other legislative act;

(g) Any body created by state or local authority in any branch of government;

(h) Any body which derives at least twenty-five (25%) of its funds expended by it in the Commonwealth of Kentucky from state or local authority funds;

(i) Any entity where the majority of its governing body is appointed by a public agency as defined in paragraph (a), (b), (c), (d), (e), (f), (g), (h), (j), or (k) of this subsection; by a member or employee of such a public agency; or by any combination thereof;

(j) Any board, commission, committee, subcommittee, ad hoc committee, advisory committee, council, or agency, except for a committee of a hospital medical staff, established, created, and controlled by a public agency as defined in paragraph (a), (b), (c), (d), (e), (f), (g), (h), (i), or (k) of this subsection; and

(k) Any interagency body of two (2) or more public agencies where each public agency is defined in paragraph (a), (b), (c), (d), (e), (f), (g), (h), (i), or (j) of this subsection;

(2) "Public record" means all books, papers, maps, photographs, cards, tapes, discs, diskettes, recordings, software, or other documentation regardless of physical form or characteristics, which are prepared, owned, used, in the possession of or retained by a public agency. "Public record" shall not include any records owned or maintained by or for a body referred to in subsection (1)(h) of this section that are not related to functions, activities, programs, or operations funded by state or local authority;

(3)(a) "Software" means the program code which makes a computer system function, but does not include that portion of the program code which contains public records exempted from inspection as provided by KRS 61.878 or specific addresses of files, passwords, access codes, user identifications, or any other mechanism for controlling the security or restricting access to public records in the public agency's computer system.

(b) "Software" consists of the operating system, application programs, procedures, routines, and subroutines such as translators and utility programs, but does not include that material which is prohibited from disclosure or copying by a license agreement between a public

agency and an outside entity which supplied the material to the agency;

(4)(a) "Commercial purpose" means the direct or indirect use of any part of a public record or records, in any form, for sale, resale, solicitation, rent, or lease or a service, or any use by which the user expects a profit either through commission, salary, or fee.

(b) "Commercial purpose" shall not include:

1. Publication or related use of a public record by a newspaper or periodical;

2. Use of a public record by a radio or television station in its news or other informational programs; or

3. Use of a public record in the preparation for prosecution or defense of litigation, or claims settlement by the parties to such action, or the attorneys representing the parties;

(5) "Official custodian" means the chief administrative officer or any other officer or employee of a public agency who is responsible for the maintenance, care and keeping of public records, regardless of whether such records are in his actual personal custody and control;

(6) "Custodian" means the official custodian or any authorized person having personal custody and control of public records;

(7) "Media" means the physical material in or on which records may be stored or represented, and which may include, but is not limited to paper, microform, disks, diskettes, optical disks, magnetic tapes, and cards; and

(8) "Mechanical processing" means any operation or other procedure which is transacted on a machine, and which may include, but is not limited to a copier, computer, recorder or tape processor, or other automated device.

**61.874. Abstracts, memoranda, copies – Agency may prescribe fee – Use of nonexempt public records for commercial purposes – Online access.**

(1) Upon inspection, the applicant shall have the right to make abstracts of the public records and memoranda thereof, and to obtain copies of all public records not exempted by the terms of KRS 61.878 When copies are requested, the custodian may require a written request and advance payment of the prescribed fee, including postage where appropriate. If the applicant desires copies of public records other than written records, the custodian of the records shall duplicate the records or permit the applicant to duplicate the records; however, the custodian shall ensure that such duplication will not damage or alter the original records.

(2)(a) Nonexempt public records used for noncommercial purposes shall be available for copying in either standard electronic or standard hard copy format, as designated by the party requesting the records, where the agency currently maintains the records in electronic format. Nonexempt public records used for noncommercial purposes shall be copied in standard hard copy format where agencies currently maintain records in hard copy format. Agencies are not required to convert hard copy format records to electronic formats.

(b) The minimum standard format in paper form shall be defined as not less than 8 1/2 inches x 11 inches in at least one (1) color on white paper, or for electronic format, in a flat file electronic American Standard Code for Information Interchange (ASCII) format. If the public agency maintains electronic public records in a format other than ASCII, and this format conforms to the requestor's requirements, the public record may be provided

in this alternate electronic format for standard fees as specified by the public agency. Any request for a public record in a form other than the forms described in this section shall be considered a nonstandardized request.

(3) The public agency may prescribe a reasonable fee for making copies of nonexempt public records requested for use for noncommercial purposes which shall not exceed the actual cost of reproduction, including the costs of the media and any mechanical processing cost incurred by the public agency, but not including the cost of staff required. If a public agency is asked to produce a record in a nonstandardized format, or to tailor the format to meet the request of an individual or a group, the public agency may at its discretion provide the requested format and recover staff costs as well as any actual costs incurred.

(4)(a) Unless an enactment of the General Assembly prohibits the disclosure of public records to persons who intend to use them for commercial purposes, if copies of nonexempt public records are requested for commercial purposes, the public agency may establish a reasonable fee.

(b) The public agency from which copies of nonexempt public records are requested for a commercial purpose may require a certified statement from the requestor stating the commercial purpose for which they shall be used, and may require the requestor to enter into a contract with the agency. The contract shall permit use of the public records for the stated commercial purpose for a specified fee.

(c) The fee provided for in subsection (a) of this section may be based on one or both of the following:

1. Cost to the public agency of media, mechanical processing, and staff required to produce a copy of the public record or records;

2. Cost to the public agency of the creation, purchase, or other acquisition of the public records.

(5) It shall be unlawful for a person to obtain a copy of any part of a public record for a:

(a) Commercial purpose, without stating the commercial purpose, if a certified statement from the requestor was required by the public agency pursuant to subsection (4)(b) of this section; or

(b) Commercial purpose, if the person uses or knowingly allows the use of the public record for a different commercial purpose; or

(c) Noncommercial purpose, if the person uses or knowingly allows the use of the public record for a commercial purpose. A newspaper, periodical, radio or television station shall not be held to have used or knowingly allowed the use of the public record for a commercial purpose merely because of its publication or broadcast, unless it has also given its express permission for that commercial use.

(6) Online access to public records in electronic form, as provided under this section, may be provided and made available at the discretion of the public agency. If a party wishes to access public records by electronic means and the public agency agrees to provide online access, a public agency may require that the party enter into a contract, license, or other agreement with the agency, and may charge fees for these agreements. Fees shall not exceed:

(a) The cost of physical connection to the system and reasonable cost of computer time access charges; and

(b) If the records requested for a commercial purpose, a reasonable fee based on the factors set forth in subsection (4) of this section.

(Enact. Acts 1976, ch. 273, § 3; 1992, ch. 163, § 4, effective July 14, 1992; 1994, ch. 262, § 4, effective July 15, 1994.)

**61.8745. Damages recoverable by public agency for person's misuse of public records.**

A person who violates subsections (2) to (6) of KRS 61.874 shall be liable to the public agency from which the public records were obtained for damages in the amount of:

(1) Three (3) times the amount that would have been charged for the public record if the actual commercial purpose for which it was obtained or used had been stated;

(2) Costs and reasonable attorney's fees; and

(3) Any other penalty established by law.

(Enact. Acts 1994, ch. 262, § 7, effective July 15, 1994.)

**528 U.S. 32, 120 S.Ct. 483**

Supreme Court of the United States

LOS ANGELES POLICE DEPARTMENT,
Petitioner

v.

UNITED REPORTING PUBLISHING CORPORATION

**No. 98-678.**

Argued Oct. 13, 1999.
Decided Dec. 7, 1999.

Thomas C. Goldstein, Washington, DC, for petitioner.

Edward C. DuMont, New York City, for the United States, as amicus curiae, by special leave of the Court.

Bruce J. Ennis, Washington, DC, for the respondent.

Chief Justice *REHNQUIST* delivered the opinion of the Court.

California Govt. Code Ann. § 6254(f)(3) (West Supp. 1999) places two conditions on public access to arrestees' addresses – that the person requesting an address declare that the request is being made for one of five prescribed purposes, and that the requester also declare that the address will not be used directly or indirectly to sell a product or service.

The District Court permanently enjoined enforcement of the statute, and the Court of Appeals affirmed, holding that the statute was facially invalid because it unduly burdens commercial speech. We hold that the statutory section in question was not subject to a "facial" challenge.

Petitioner, the Los Angeles Police Department, maintains records relating to arrestees. Respondent, United Reporting Publishing Corporation, is a private publishing service that provides the names and addresses of recently arrested individuals to its customers, who include attorneys, insurance companies, drug and alcohol counselors, and driving schools.

Before July 1, 1996, respondent received arrestees' names and addresses under the old version of § 6254, which generally required state and local law enforcement agencies to make public the name, address, and occupation of every individual arrested by the agency. Cal. Govt.Code Ann. § 6254(f) (West 1995). Effective July 1, 1996, the state legislature amended § 6254(f) to limit the public's access to arrestees' and victims' current addresses. The amended statute provides that state and local law enforcement agencies shall make public:

> "[T]he current address of every individual arrested by the agency and the current address of the victim of a crime, where the requester declares under penalty of perjury that the request is made for a scholarly, journalistic, political, or governmental purpose, or that the request is made for investigation purposes by a licensed private investigator . . . except that the address of the victim of [certain crimes] shall remain confidential. Address information obtained pursuant to this paragraph shall not be used directly or indirectly to sell a product or service to any individual or group of individuals, and the requester shall execute a declaration to that effect under penalty of perjury." Cal. Govt.Code Ann. § 6254(f)(3) (West Supp.1999).

Sections 6254(f)(1) and (2) require that state and local law enforcement agencies make public, *inter alia,* the name, occupation, and physical description, including date of birth, of every individual arrested by the agency, as well as the circumstances of the arrest.[1] Thus, amended § 6254(f ) limits access only to the arrestees' addresses.

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[1] Section 6254(f) provides, in pertinent part:

"Other provisions of this subdivision notwithstanding, state and local law enforcement agencies shall make public the following information, except to the extent that disclosure of a particular item of information would endanger the safety of a person involved in an investigation or would endanger the successful completion of the investigation or a related investigation:

"(1) The full name and occupation of every individual arrested by the agency, the individual's physical description including date of birth, color of eyes and hair, sex, height and weight, the time and date of arrest, the time and date of booking, the location of the arrest, the factual circumstances surrounding the arrest, the amount of bail set, the time and manner of release or the location where the individual is currently being held, and all charges the individual is being held upon, including any outstanding warrants from other jurisdictions and parole or probation holds.

"(2) Subject to the restrictions imposed by Section 841.5 of the Penal Code, the time, substance, and location of all complaints or requests for assistance received by the agency and the time and nature of the response thereto, including, to the extent the information regarding crimes alleged or committed or any other incident investigated is recorded, the time, date, and location of occurrence, the time and date of the report, the name and age of the victim, the factual circumstances surrounding the crime or incident, and a general description of any injuries, property, or weapons involved. The name of a victim of any crime defined by Section 220, 261, 262, 264, 264.1, 273a, 273d, 273.5, 286, 288, 288a, 289, 422.6, 422.7, 422.75, or

(Continued on following page)

Before the effective date of the amendment, respondent sought declaratory and injunctive relief pursuant to Rev. Stat. § 1979, 42 U.S.C. § 1983, to hold the amendment unconstitutional under the First and Fourteenth Amendments to the United States Constitution. On the effective date of the statute, petitioner and other law enforcement agencies denied respondent access to the address information because, according to respondent, "[respondent's] employees could not sign section 6254(f)(3) declarations." Brief for Respondent 5. Respondent did not allege, and nothing in the record before this Court indicates, that it ever "declar[ed] under penalty of perjury" that it was requesting information for one of the prescribed purposes and that it would not use the address information to "directly or indirectly . . . sell a product or service," as would have been required by the statute. See § 6254(f)(3).

Respondent then amended its complaint and sought a temporary restraining order. The District Court issued a temporary restraining order, and, a few days later, issued a preliminary injunction. Respondent then filed a motion for summary judgment, which was granted. In granting

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646.9 of the Penal Code may be withheld at the victim's request, or at the request of the victim's parent or guardian if the victim is a minor. When a person is the victim of more than one crime, information disclosing that the person is a victim of a crime defined by Section 220, 261, 262, 264, 264.1, 273a, 273d, 286, 288, 288a, 289, 422.6, 422.7, 422.75, or 646.9 of the Penal Code may be deleted at the request of the victim, or the victim's parent or guardian if the victim is a minor, in making the report of the crime, or of any crime or incident accompanying the crime, available to the public in compliance with the requirements of this paragraph."

the motion, the District Court construed respondent's claim as presenting a facial challenge to amended § 6254(f). *United Reporting Publishing Corp. v. Lungren,* 946 F.Supp. 822, 823 (S.D.Cal.1996). The court held that the statute was facially invalid under the First Amendment.

The Court of Appeals affirmed the District Court's facial invalidation. *United Reporting Publishing Corp. v. California Highway Patrol,* 146 F.3d 1133 (C.A.9 1998). The court concluded that the statute restricted commercial speech, and, as such, was entitled to "'a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values.'" *Ibid.* (quoting *Ohralik v. Ohio State Bar Assn.,* 436 U.S. 447, 456, 98 S.Ct. 1925, 56 L.Ed.2d 444 (1978)). The court applied the test set out in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.,* 447 U.S. 557, 566, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980), and found that the asserted governmental interest in protecting arrestees' privacy was substantial. But, the court held that "the numerous exceptions to § 6254(f)(3) for journalistic, scholarly, political, governmental, and investigative purposes render the statute unconstitutional under the First Amendment." 146 F.3d, at 1140. The court noted that "[h]aving one's name, crime, and address printed in the local paper is a far greater affront to privacy than receiving a letter from an attorney, substance abuse counselor, or driving school eager to help one overcome his present difficulties (for a fee, naturally)," and thus that the exceptions "undermine and counteract" the asserted governmental interest in preserving arrestees' privacy. *Ibid.* Thus, the Court of Appeals affirmed the District Court's grant of summary judgment in favor of respondent and upheld the injunction

against enforcement of § 6254(f)(3). We granted certiorari. 525 U.S. 1121, 119 S.Ct. 901, 142 L.Ed.2d 901 (1999).

We hold that respondent was not, under our cases, entitled to prevail on a "facial attack" on § 6254(f)(3).

Respondent's primary argument in the District Court and the Court of Appeals was that § 6254(f)(3) was invalid on its face, and respondent maintains that position here. But we believe that our cases hold otherwise.

The traditional rule is that "a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court." *New York v. Ferber,* 458 U.S. 747, 767, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982) (citing *Broadrick v. Oklahoma,* 413 U.S. 601, 610, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973)).

Prototypical exceptions to this traditional rule are First Amendment challenges to statutes based on First Amendment overbreadth. "At least when statutes regulate or proscribe speech . . . the transcendent value to all society of constitutionally protected expression is deemed to justify allowing 'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.'" *Gooding v. Wilson,* 405 U.S. 518, 520-521, 92 S.Ct. 1103, 31 L.Ed.2d 408 (1972) (quoting *Dombrowski v. Pfister,* 380 U.S. 479, 486, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965)). "This is deemed necessary because persons whose expression is constitutionally protected may well refrain from exercising their right for fear of criminal sanctions provided by a statute susceptible of application to protected expression."

*Gooding v. Wilson, supra,* at 520-521, 92 S.Ct. 1103. See also *Thornhill v. Alabama,* 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093 (1940).

In *Gooding,* for example, the defendant was one of a group that picketed an Army headquarters building carrying signs opposing the Vietnam war. A confrontation with the police occurred, as a result of which Gooding was charged with "'using opprobrious words and abusive language . . . tending to cause a breach of the peace.'" 405 U.S., at 518-519, 92 S.Ct. 1103. In *Thornhill,* the defendant was prosecuted for violation of a statute forbidding any person to "'picket the works or place of business of such other persons, firms, corporations, or associations of persons, for the purpose of hindering, delaying, or interfering with or injuring any lawful business or enterprise . . . .'" 310 U.S., at 91, 60 S.Ct. 736.

This is not to say that the threat of criminal prosecution is a necessary condition for the entertainment of a facial challenge. We have permitted such attacks on statutes in appropriate circumstances where no such threat was present. See, *e.g., National Endowment for Arts v. Finley,* 524 U.S. 569, 118 S.Ct. 2168, 141 L.Ed.2d 500 (1998) (entertaining a facial challenge to a public funding scheme); *Suitum v. Tahoe Regional Planning Agency,* 520 U.S. 725, 117 S.Ct. 1659, 137 L.Ed.2d 980 (1997) (entertaining a landowner's facial challenge to a local redevelopment plan); *Anderson v. Edwards,* 514 U.S. 143, 115 S.Ct. 1291, 131 L.Ed.2d 178 (1995) (entertaining a facial challenge to a state regulation restructuring the disbursal of welfare benefits).

But the allowance of a facial overbreadth challenge to a statute is an exception to the traditional rule that "a

person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court." *Ferber, supra,* at 767, 102 S.Ct. 3348 (citing *Broadrick, supra,* at 610, 93 S.Ct. 2908). This general rule reflects two "cardinal principles" of our constitutional order: the personal nature of constitutional rights and the prudential limitations on constitutional adjudication. 458 U.S., at 767, 102 S.Ct. 3348. "By focusing on the factual situation before us, and similar cases necessary for development of a constitutional rule, we face 'flesh and blood' legal problems with data 'relevant and adequate to an informed judgment.'" *Id.,* at 768, 102 S.Ct. 3348 (footnotes omitted).

Even though the challenge be based on the First Amendment, the overbreadth doctrine is not casually employed. "Because of the wide-reaching effects of striking down a statute on its face at the request of one whose own conduct may be punished despite the First Amendment, we have recognized that the overbreadth doctrine is 'strong medicine' and have employed it with hesitation, and then 'only as a last resort.'" *Id.,* at 769, 102 S.Ct. 3348 (citing *Broadrick,* supra, at 613, 93 S.Ct. 2908). "'[F]acial overbreadth adjudication is an exception to our traditional rules of practice and . . . its function, a limited one at the outset, attenuated as the otherwise unprotected behavior that it forbids the State to sanction moves from "pure speech" toward conduct and that conduct – even if expressive – falls within the scope of otherwise valid criminal laws . . . .'" 458 U.S., at 770, 102 S.Ct. 3348 (quoting *Broadrick,* supra, at 615, 93 S.Ct. 2908). See also *Board of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc.,* 482 U.S. 569, 107 S.Ct. 2568, 96 L.Ed.2d 500 (1987).

The Court of Appeals held that § 6254(f)(3) was facially invalid under the First Amendment. Petitioner contends that the section in question is not an abridgment of anyone's right to engage in speech, be it commercial or otherwise, but simply a law regulating access to information in the hands of the police department.

We believe that, at least for purposes of facial invalidation, petitioner's view is correct. This is not a case in which the government is prohibiting a speaker from conveying information that the speaker already possesses. See *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 115 S.Ct. 1585, 131 L.Ed.2d 532 (1995). The California statute in question merely requires that if respondent wishes to obtain the addresses of arrestees it must qualify under the statute to do so. Respondent did not attempt to qualify and was therefore denied access to the addresses. For purposes of assessing the propriety of a facial invalidation, what we have before us is nothing more than a governmental denial of access to information in its possession. California could decide not to give out arrestee information at all without violating the First Amendment.[2] Cf. *Houchins v. KQED, Inc.*, 438 U.S. 1, 14, 98 S.Ct. 2588, 57 L.Ed.2d 553 (1978).

To the extent that respondent's "facial challenge" seeks to rely on the effect of the statute on parties not before the Court – its potential customers, for example – its claim does not fit within the case law allowing courts to

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[2] Respondent challenged the statute as a violation of equal protection under the Fourteenth Amendment, but the Court of Appeals did not pass on that challenge, nor do we.

entertain facial challenges. No threat of prosecution, for example, see *Gooding,* or cutoff of funds, see *NEA,* hangs over their heads. They may seek access under the statute on their own just as respondent did, without incurring any burden other than the prospect that their request will be denied. Resort to a facial challenge here is not warranted because there is "[no] possibility that protected speech will be muted." *Bates v. State Bar of Ariz.,* 433 U.S. 350, 380, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977).

The Court of Appeals was therefore wrong to facially invalidate § 6254(f)(3). Respondent urges several grounds as alternative bases for affirmance, but none of them were passed on by the Court of Appeals and they will remain open on remand if properly presented and preserved there.

The judgment of the Court of Appeals is accordingly

*Reversed.*

Justice *SCALIA*, with whom Justice THOMAS joins, concurring.

I join the Court's opinion because I agree that, insofar as this case presents a facial challenge to the statute, the fact that it is formally nothing but a restriction upon access to government information is determinative. As the Court says, that fact eliminates any "chill" upon speech that would allow a plaintiff to complain about the application of the statute to someone other than himself.

I understand the Court's opinion as not addressing the as-applied challenge to the statute, and as leaving that question open upon remand. That seems to me a permissible course, since the Court of Appeals' judgment here affirmed without qualification the judgment of the District

Court, which rested exclusively upon the facial unconstitutionality of the statute and hence purported to invalidate it in all its applications. Though there are portions of the Court of Appeals' opinion that address the particular circumstances of this respondent, I do not read it as narrowing the facial invalidation, nor as offering as-applied invalidation as an alternative ground for affirmance.

I do not agree with Justice GINSBURG that what renders this statute immune from a facial challenge necessarily renders it immune from an as-applied challenge as well. A law that is formally merely a restriction upon access to information subjects no speaker to the risk of prosecution, and hence there is no need to protect such speakers by allowing someone else to raise their challenges to the law. But it is an entirely different question whether a restriction upon access that *allows* access to the press (which in effect makes the information part of the public domain), but at the same time *denies* access to persons who wish to use the information for certain speech purposes, is in reality a restriction upon speech rather than upon access to government information. That question – and the subsequent question whether, if it is a restriction upon speech, its application to this respondent is justified – is not addressed in the Court's opinion.

Justice *GINSBURG*, with whom Justice *O'CONNOR*, Justice *SOUTER*, and Justice *BREYER* join, concurring.

I join the Court's opinion, which recognizes that California Government Code § 6254(f)(3) is properly analyzed as a restriction on access to government information, not as a restriction on protected speech. See *ante,* at

489. That is sufficient reason to reverse the Ninth Circuit's judgment.

As the Court observes, see *ibid.*, the statute at issue does not restrict speakers from conveying information they already possess. Anyone who comes upon arrestee address information in the public domain is free to use that information as she sees fit. It is true, as Justice SCALIA suggests, *ante* at 490 (concurring opinion), that the information could be provided to and published by journalists, and § 6254(f)(3) would indeed be a speech restriction if it then prohibited people from using that published information to speak to or about arrestees. But the statute contains no such prohibition. Once address information is in the public domain, the statute does not restrict its use in any way.

California could, as the Court notes, constitutionally decide not to give out arrestee address information at all. See *ante,* at 489-490. It does not appear that the selective disclosure of address information that California has chosen instead impermissibly burdens speech. To be sure, the provision of address information is a kind of subsidy to people who wish to speak to or about arrestees, and once a State decides to make such a benefit available to the public, there are no doubt limits to its freedom to decide how that benefit will be distributed. California could not, for example, release address information only to those whose political views were in line with the party in power. Cf. *Board of Comm'rs, Wabaunsee Cty. v. Umbehr,* 518 U.S. 668, 116 S.Ct. 2342, 135 L.Ed.2d 843 (1996) (local officials may not terminate an independent contractor for criticizing government policy). But if the award of the subsidy is not based on an illegitimate criterion such as viewpoint,

California is free to support some speech without supporting other speech. See *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 103 S.Ct. 1997, 76 L.Ed.2d 129 (1983).

Throughout its argument, respondent assumes that § 6254(f)(3)'s regime of selective disclosure burdens speech in the sense of reducing the total flow of information. Whether that is correct is far from clear and depends on the point of comparison. If California were to publish the names and addresses of arrestees for everyone to use freely, it would indeed be easier to speak to and about arrestees than it is under the present system. But if States were required to choose between keeping proprietary information to themselves and making it available without limits, States might well choose the former option. In that event, disallowing selective disclosure would lead not to more speech overall but to more secrecy and less speech. As noted above, this consideration could not justify limited disclosures that discriminated on the basis of viewpoint or some other proscribed criterion. But it does suggest that society's interest in the free flow of information might argue for upholding laws like the one at issue in this case rather than imposing an all- or-nothing regime under which "nothing" could be a State's easiest response.

Justice *STEVENS*, with whom Justice *KENNEDY* joins, dissenting.

The majority's characterization of this case as an improper facial challenge is misguided. Even a brief look at the complaint reveals that respondent unequivocally advanced both a facial and an "as applied" challenge to the constitutionality of California Government Code § 6254(f)(3) (hereinafter Amendment). In each of the six

counts of its complaint, respondent explicitly challenged the Amendment on its face "and as applied." Complaint ¶¶ 29, 32, 35, 38, 41, 43. Respondent also alleged that it "will be and has already been injured in a serious way by the Amendment"; specifically, it claimed that it "has lost prospective clients and sales, and will ultimately be put out of business." *Id.*, ¶ 23. Finally, respondent has maintained before us that it continues to challenge the Amendment "on its face and as applied." Brief for Respondent 15.[1] It is, therefore, perfectly clear that respondent's allegations of direct injury justified the decision of the District Court and the Court of Appeals to pass on the validity of the Amendment.[2]

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[1] The majority suggests that respondent was denied the information simply because it "did not attempt to qualify" under the statute. *Ante,* at 489-490. This suggestion assumes that respondent's publication might qualify as "journalistic" even though it serves primarily as a mere conduit of data to prospective commercial users. The Amendment provides, however, that even a "journalistic" publication must sign, under risk of criminal prosecution for perjury, an affidavit stating that the information will "not be used directly or indirectly to sell a product or service to any individual or group of individuals." Cal. Govt.Code Ann. § 6254(f)(3) (West Supp.1999). Not coincidentally, that is precisely how respondent uses the information. Accordingly, not only is the belief that respondent would have qualified under the statute unrealistic, but the notion that respondent must put itself at risk of 2-to-4 years' imprisonment in order to raise a constitutional challenge to a state statute is alarming, to say the least.

[2] The majority's characterization of both the lower court decisions as simple facial invalidations is perplexing. See *ante,* at 487-488. The District Court explicitly phrased the issue presented as whether "the amendment to Cal. Gov.Code § 6254 [is] an unconstitutional limitation on *plaintiff's* commercial speech." *United Reporting Publishing Corp. v. Lungren,* 946 F.Supp. 822, 824 (S.D.Cal.1996) (emphasis added). Similarly, the Ninth Circuit concluded its opinion by stating that it need not reach respondent's "overbreadth arguments," *United Reporting*

(Continued on following page)

To determine whether the Amendment is valid as applied to respondent, it is similarly not necessary to invoke the overbreadth doctrine. That doctrine is only relevant if the challenger needs to rely on the possibility of invalid applications to third parties. In this case, it is the application of the Amendment to respondent itself that is at issue. Nor, in my opinion, is it necessary to do the four-step *Central Hudson* dance, because I agree with the majority that the Amendment is really a restriction on access to government information rather than a direct restriction on protected speech. For this reason, the majority is surely correct in observing that "California could decide not to give out arrestee information at all without violating the First Amendment." *Ante,* at 489-490. Moreover, I think it equally clear that California could release the information on a selective basis to a limited group of users who have a special, and legitimate, need for the information.

A different, and more difficult, question is presented when the State makes information generally available, but denies access to a small disfavored class. In this case, the State is making the information available to scholars, news media, politicians, and others, while denying access to a narrow category of persons solely because they intend to use the information for a constitutionally protected purpose. As Justice GINSBURG points out, if the State identified the disfavored persons based on their viewpoint, or political affiliation, for example, the discrimination

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*Publishing Corp. v. California Highway Patrol,* 146 F.3d 1133, 1140, n. 6 (1998), clearly indicating that it was not deciding the case as a facial challenge.

would clearly be invalid. See *ante,* at 490-491 (concurring opinion).

What the State did here, in my opinion, is comparable to that obviously unconstitutional discrimination. In this case, the denial of access is based on the fact that respondent plans to publish the information to others who, in turn, intend to use it for a commercial speech purpose that the State finds objectionable. Respondent's proposed publication of the information is indisputably lawful – petitioner concedes that if respondent independently acquires the data, the First Amendment protects its right to communicate it to others. Brief for Petitioner 27; see also *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 496, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975). Similarly, the First Amendment supports the third parties' use of it for commercial speech purposes. See *Shapero v. Kentucky Bar Assn.,* 486 U.S. 466, 472, 108 S.Ct. 1916, 100 L.Ed.2d 475 (1988). Thus, because the State's discrimination is based on its desire to prevent the information from being used for constitutionally protected purposes, I think it must assume the burden of justifying its conduct.

The only justification advanced by the State is an asserted interest in protecting the privacy of victims and arrestees. Although that interest would explain a total ban on access, or a statute narrowly limiting access, it is insufficient when the data can be published in the news media and obtained by private investigators or others who meet the Amendment's vague criteria. This Amendment plainly suffers from the same "overall irrationality" that undermined the statutes at issue in *Rubin v. Coors Brewing Co.,* 514 U.S. 476, 488, 115 S.Ct. 1585, 131 L.Ed.2d 532 (1995), and *Greater New Orleans Broadcasting Assn., Inc. v. United States,* 527 U.S. 173, 119 S.Ct. 1923, 144

L.Ed.2d 161 (1999). By allowing such widespread access to the information, the State has eviscerated any rational basis for believing that the Amendment will truly protect the privacy of these persons. See *Cox Broadcasting Corp.*, 420 U.S., at 493-495, 95 S.Ct. 1029.

A different, and more likely, rationale that might explain the restriction is the State's desire to prevent lawyers from soliciting law business from unrepresented defendants.[3] This interest is arguably consistent with trying to uphold the ethics of the legal profession. Also at stake here, however, are the important interests of allowing lawyers to engage in protected speech and potentially giving criminal defendants better access to needed professional assistance. See *Bates v. State Bar of Ariz.*, 433 U.S. 350, 376, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977). Ultimately, this state interest must fail because at its core it relies on discrimination against disfavored speech.[4]

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[3] While there is no direct evidence that the State is acting with intended animus toward respondent and others' speech, see Brief for Petitioner 13, n. 5, we have expressly rejected the argument that "discriminatory . . . treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas," *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 117, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991).

[4] Our cases have repeatedly frowned on regulations that discriminate based on the content of the speech or the identity of the speaker. See, *e.g.*, *Greater New Orleans Broadcasting Assn., Inc. v. United States*, 527 U.S. 173, 190, 119 S.Ct. 1923, 1933, 144 L.Ed.2d 161 (1999) (Government cannot restrict advertising for private casinos while allowing the advertising for tribal casinos); *Simon & Schuster, Inc.*, 502 U.S., at 116, 112 S.Ct. 501 (government cannot "singl[e] out income derived from expressive activity for a burden the State places on no other income"); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 229, 107 S.Ct. 1722, 95 L.Ed.2d 209 (1987) (a tax that applies to some

(Continued on following page)

That the State might simply withhold the information from all persons does not insulate its actions from constitutional scrutiny. For even though government may withhold a particular benefit entirely, it "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests – especially his interest in freedom of speech." *Perry v. Sindermann,* 408 U.S. 593, 597, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972). A contrary view would impermissibly allow the government to "'produce a result which [it] could not command directly.'" *Ibid.* It is perfectly clear that California could not directly censor the use of this information or the resulting speech. It follows, I believe, that the State's discriminatory ban on access to information – in an attempt to prohibit persons from exercising their constitutional rights to publish it in a truthful and accurate manner – is equally invalid.

Accordingly, I respectfully dissent.

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magazines but not to others "is particularly repugnant to First Amendment principles: a magazine's tax status depends entirely on its content" (emphasis deleted)); *Regan v. Time, Inc.,* 468 U.S. 641, 648-649, 104 S.Ct. 3262, 82 L.Ed.2d 487 (1984) ("Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment"); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue,* 460 U.S. 575, 582, 103 S.Ct. 1365, 75 L.Ed.2d 295 (1983) (a tax that "single[s] out the press for special treatment" is unconstitutional); *Police Dept. of Chicago v. Mosley,* 408 U.S. 92, 96, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972) ("[W]e have frequently condemned . . . discrimination among different users of the same medium for expression").

No. 03-498

Supreme Court, U.S.
FILED
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In The
# Supreme Court of the United States

STEPHEN AMELKIN; DR. BRIAN CHRISTOPHER FEE; STUART LYON; NICHOLAS BAKER; DAVID KAPLAN; JAMES W. CHAMBERS; SIDNEY HANISH; RHODA DANIELS; THOMAS H. WATSON; KENNETH W. WALL; JAMES BOGARD,

*Petitioners,*

v.

ANN McCLURE, Document Custodian; GARY ROSE, Commissioner of Department of State Police; JUSTICE CABINET; DEPARTMENT OF STATE POLICE; and BEN CHANDLER, Attorney General for the Commonwealth of Kentucky,

AND

LOUISVILLE AND JEFFERSON COUNTY METROPOLITAN SEWER DISTRICT,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

## BRIEF IN OPPOSITION

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## QUESTION PRESENTED FOR REVIEW

Whether, under the First Amendment, a state statute which makes traffic accident reports confidential, but allows a report to be provided to the parties to the accident or their representatives or insurers, or to a news-gathering organization for the purpose of reporting the news, is constitutional as applied to the Petitioners, attorneys and chiropractors who allege that they would use the information in the reports to direct advertising material to accident victims.

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## STATEMENT OF THE CASE

This case has had a tortured and convoluted procedural history. The action was originally brought by the Petitioners in 1994 against Ann McClure as custodian of records for a local post of the Kentucky Department of State Police. The Petitioners sought a determination that the 1994 amendments to Kentucky Revised Statutes ("KRS") § 189.635 (establishing confidentiality of accident reports) were unconstitutional as an infringement on their freedom of commercial speech, and further sought an injunction against the enforcement of the amended statute. Jerry Lovitt, then Commissioner of the Kentucky State Police, was later made a Defendant in his official capacity, as was his successor, Gary Rose. Ann McClure was eventually dismissed as a Defendant. On March 27, 2000, Lovitt and Rose were dismissed as Defendants and Robert F. Stephens, Acting Commissioner, was made a Defendant. Stephens is now deceased; pursuant to FRCP 25(d)(1), the current Commissioner, Patrick N. Simpson, is automatically substituted as Respondent herein.

After initially obtaining a preliminary injunction against enforcement of the amendments to KRS 189.635 (later dissolved by order of the Sixth Circuit), the Petitioners filed a parallel civil action in the Western District of Kentucky naming as a class Defendant all city and county governments that maintained accident reports. That civil action was eventually consolidated into the instant case.

On April 3, 1996, the Petitioners filed a Second Amended Complaint which added a claim that KRS 61.874, as amended in 1994 (permitting agencies to charge additional fees for copies of public records when requested for commercial purposes), was unconstitutional, both on

its face and as applied to Petitioners by Gary Rose. Specifically, the Petitioners alleged that Rose had imposed an arbitrarily high fee for records requested for commercial purposes as opposed to records requested for non-commercial purposes.

On June 4, 1996, the District Court entered a preliminary and permanent injunction enjoining enforcement of KRS 189.635(5)-(6) and KRS 61.874 on the basis of facial unconstitutionality. *Amelkin v. Commissioner, Dept. of State Police,* 936 F.Supp. 428 (W.D.Ky. 1996). The Sixth Circuit reversed in part, apparently indicating that there was no facial invalidity to KRS 61.874, but remanding for specific findings as to the Petitioners' claim that the statute was unconstitutionally applied through the imposition of excessive copying fees. (Pet. at 33a; *Amelkin v. McClure ("Amelkin II"),* 168 F.3d 893 (6th Cir. 1999).)

This Court granted certiorari and vacated the Sixth Circuit's 1999 opinion, remanding the case for reconsideration in light of *Los Angeles Police Dept. v. United Reporting Publishing Corp.,* 528 U.S. 32 (1999). (Pet. at 32a; *McClure v. Amelkin,* 528 U.S. 1059 (1999).) On reconsideration, the Sixth Circuit reversed the District Court's holding that KRS 189.635(5)-(6) was invalid on its face, in light of the *United Reporting* case. The Sixth Circuit remanded the case to the District Court for consideration of Petitioners' "as-applied" challenge to KRS 189.635, as well as their "as-applied" challenge to KRS 61.874. (Pet. at 25a; *Amelkin v. McClure ("Amelkin III"),* 205 F.3d 293 (6th Cir. 2000).) This Court denied certiorari on October 2, 2000. (Pet. at 24a; *Amelkin v. McClure,* 531 U.S. 871 (2000).) **At that point, the Petitioners' facial challenges to KRS 189.635 were finished.**

The District Court, on motion, dissolved all injunctions on June 11, 2001. The Petitioners then proceeded to present their case to the District Court on their challenge to KRS 189.635 and KRS 61.874 as applied.

The case was submitted on cross-motions for summary judgment. The District Court found that the Petitioners had alleged no facts to distinguish the application of KRS 189.635 in this case from its facial terms as written. (Pet. at 22a; *Amelkin v. McClure,* 178 F.Supp.2d 766, 771 (W.D.Ky. 2001).) Accordingly, the District Court followed the reasoning of *United Reporting* and the Sixth Circuit's analysis of KRS 189.635, and concluded from the record that the statute was not unconstitutional as applied to the Petitioners. (Pet. at 22a; *Amelkin,* 178 F.Supp.2d at 771.) Since KRS 189.635 was constitutional as applied, the accident reports sought by the Petitioners for commercial purposes were confidential, and the District Court therefore found the Petitioners' claim of excessive copying fees under KRS 61.874 to be moot. (Pet. at 23a; *Amelkin,* 178 F.Supp.2d at 771.) The Respondents' summary judgment motion was granted, and the Petitioners' motion was denied. (*Id.*)

On appeal, the Sixth Circuit analyzed KRS 189.635 as applied to Petitioners, in light of this Court's reasoning in *Los Angeles Police Dept. v. United Reporting Publishing Corp.,* 528 U.S. 32 (1999), and concluded that the statute was constitutional. The panel found that the statute neither restricted the Petitioners' right to engage in commercial speech, nor discriminated against the Petitioners based on their intent to engage in commercial speech, but merely limited access to government information (accident reports) to news-gathering organizations and those individuals with a personal interest in the

accident. (Pet. at 11a; *Amelkin v. McClure ("Amelkin IV")*, 330 F.3d 822, 828 (6th Cir. 2003).) The Sixth Circuit further found that KRS 189.635 did not offend equal protection, since the protection of accident victims' privacy afforded a rational basis for the distinctions drawn in the statute. (Pet. at 12a; *Amelkin IV,* 330 F.3d at 829.) Finally, the Sixth Circuit agreed with the District Court that Petitioners' "as-applied" challenge to KRS 61.874 was moot. (Pet. at 13a; *Amelkin IV,* 330 F.3d at 829.) The decision of the District Court was affirmed.

Respondents wish to bring a significant misstatement in the Petition to the Court's attention, inasmuch as it is relevant to a Statement of the Case. In their own Statement of the Case, the Petitioners allege that the Sixth Circuit erred when it "apparently did not recall" or "failed to recognize" two arguments that the Petitioners in fact *failed to make*: (1) that Petitioner James Bogard was a "news-gathering organization" for purposes of KRS 189.635(6); and (2) that the Petitioners' commercial speech was restricted or burdened by KRS 61.8745, which authorizes payment of damages to a public agency for certain unauthorized uses of public records. (Pet. at 16-17.) Neither of these arguments was preserved in the District Court or the Court of Appeals below, and accordingly neither can be alleged as a point of error.

## REASONS FOR DENYING THE WRIT

### I. THERE IS NO DIVISION AMONG THE CIRCUIT COURTS AS TO THE APPLICATION OR INTERPRETATION OF THIS COURT'S RECENT DECISION IN *UNITED REPORTING*.

This Court previously remanded this case to the Sixth Circuit to be reconsidered in light of the decision in *Los Angeles Police Dept. v. United Reporting Publishing Corp.*, 528 U.S. 32 (1999). (Pet. at 32a; *McClure v. Amelkin*, 528 U.S. 1059 (1999).) The *United Reporting* case substantially altered the landscape of First Amendment law in cases dealing with access to government records.

This Court held in *United Reporting* that a state statute which merely regulates access to government information does not on its face abridge freedom of speech. *United Reporting*, 528 U.S. at 40. The Sixth Circuit, in considering the Petitioners' "as-applied" challenge, properly noted that "Section 189.635, insofar as it applies to the [Petitioners], does not restrict or even regulate expression. Rather, it simply restricts *access* to confidential information possessed by the government." (Pet. at 8a; *Amelkin IV*, 330 F.3d at 827 (emphasis in original).) Therefore, the analysis of KRS 189.635 as applied to the Petitioners reached the same result as the analysis of the statute on its face under *United Reporting*. No restriction or regulation of the Petitioners' expression was involved, and the test enunciated in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), was therefore inapplicable. (Pet. at 8a; *Amelkin IV*, 330 F.3d at 827.)

The Petitioners do not cite any decisions of other Circuit Courts implementing *United Reporting*, but simply

recount the state of the law in the circuits as it existed prior to *United Reporting.* This is no longer an accurate portrayal of the applicable law, since this Court has now made clear that the *Central Hudson* analysis only applies when the parties' freedom of speech is restricted by the statute in question. Respondents submit that there is no division among the circuits as to the application of *United Reporting* or its reasoning, since no case law has yet been developed in the various circuits applying the decision in the context of "as-applied" constitutional challenges. It would therefore be inopportune for the Court to grant the petition so soon after *United Reporting,* before the lower courts have had an opportunity to reach either a consensus or a disagreement as to its interpretation.

## II. THE PETITIONERS' CHALLENGE TO KRS 189.635 IS GOVERNED BY THIS COURT'S REASONING IN *UNITED REPORTING.*

The Sixth Circuit correctly followed this Court's reasoning in *United Reporting, supra,* and reached its holding on the basis of the analysis embodied in that decision. The court first noted that the Petitioners could not rely upon a potentially invalid application of KRS 189.635 to news-gathering organizations, since the statute on its face did not restrict speech and therefore was not subject to an "overbreadth" challenge based on the rights of others. (Pet. at 7a; *Amelkin IV,* 330 F.3d at 826 (citing *United Reporting,* 528 U.S. at 40).) The court then rejected Petitioners' contention that *Central Hudson, supra,* applied, in view of the fact that the statute placed restrictions only on their access to information, not upon their speech. (Pet. at 8a; *Amelkin IV,* 330 F.3d at 827.) This

parallels the analysis used by this Court in *United Reporting*, 528 U.S. at 40.

KRS 189.635 does not place any restrictions on the speech of the Petitioners, but merely controls access to government information. This is precisely the reason the California statute in *United Reporting* was held valid on its face: "This is not a case in which the government is prohibiting a speaker from conveying information that the speaker already possesses. . . . [W]hat we have before us is nothing more than a governmental denial of access to information in its possession." *United Reporting*, 528 U.S. at 40. Similarly, KRS 189.635 merely limits access to information. If that information should be made public by the news media, the statute does not thereafter restrict its use by the Petitioners in any way. *Cf. United Reporting*, 528 U.S. at 42-43 (Ginsburg, J., concurring).

The Sixth Circuit observed that all the separate opinions in the *United Reporting* case agreed that a state could decide not to give out certain information at all and not violate the First Amendment. (Pet. at 9a; *Amelkin IV*, 330 F.3d at 827 (citing *United Reporting*, 528 U.S. at 40).) The panel noted, however, that a majority of this Court's membership also asserted that a state could not decide to engage in political viewpoint discrimination when deciding who should receive information. (Pet. at 9a; *Amelkin IV*, 330 F.3d at 827-28 (citing *United Reporting*, 528 U.S. at 43 (Ginsburg, J., concurring), 46 (Stevens, J., dissenting)).) Analyzing the classifications in KRS 189.635 under the "unconstitutional-conditions" doctrine, the Sixth Circuit concluded that the statute did not "specifically disfavor discrete groups on content-related grounds," but merely granted access to accident reports to "news-gathering organizations and those individuals with a personal

interest in the accident." (Pet. at 11a; *Amelkin IV,* 330 F.3d at 828.) Therefore, there was no discrimination against the Petitioners based on their intent to engage in commercial speech.

This parallels the reasoning of the concurring and dissenting opinions in *United Reporting,* and makes clear that if there is any material difference between Kentucky's statute (as applied to the Petitioners) and the California statute analyzed in *United Reporting,* it is that KRS 189.635 is *less* burdensome on commercial speech. The statute at issue in *United Reporting* named a multitude of purposes for which access to arrest records was to be granted, including "a scholarly, journalistic, political, or governmental purpose, or ... for investigation purposes by a licensed private investigator." *United Reporting,* 528 U.S. at 35 (quoting Cal. Govt. Code § 6254(f)(3)). This arguably had the effect of "den[ying] access to a small disfavored class." *Id.* at 45 (Stevens, J., dissenting).

By contrast, KRS 189.635 makes accident report information confidential except for its release "on a selective basis to a limited group of users who have a special, and legitimate, need for the information." *Id.* (Stevens, J., dissenting). This limited group includes only the parties to the accident and their guardians, attorneys, and insurers; as well as news-gathering organizations reporting the news. Since Kentucky's statute imposes less of an arguable burden on commercial speech than does California's – even under the theory unsuccessfully urged by the dissent in *United Reporting* – this Court's analysis in that case is clearly dispositive of the Petitioners' First Amendment challenge to KRS 189.635 as applied to them.

Accordingly, the applicable standard was not the stringent multi-prong test of *Central Hudson, supra,* but the "rational-basis" analysis under the Equal Protection Clause. The Sixth Circuit properly found this standard was satisfied by the fact that "Kentucky's legislature might well have concluded that the occasional publication of information contained in an accident report because of its newsworthy nature is less invasive to the overall class of accident victims than the myriad other uses to which such reports could be put." (Pet. at 12a; *Amelkin IV,* 330 F.3d at 829.) The Petition is therefore without merit and the writ should be denied.

## III. THE PETITIONERS' ARGUMENTS MERELY AMOUNT TO AN ALLEGED MISAPPLICATION OF A PROPERLY STATED RULE OF LAW.

The Petition does not allege an incorrectly stated rule of law, but only a misapplication of a properly stated rule of law. Petitioners do not dispute that a statute which merely regulates access to information, and does not discriminate based on the content of a requester's speech, is constitutional. *Cf. United Reporting, supra.* They merely allege that the Sixth Circuit improperly found that KRS 189.635 as applied, under the facts presented, did not restrict their speech or discriminate against them based on their commercial speech. (Pet. at 21-27.) Accordingly, the issuance of a writ is not warranted in this case.

## IV. PETITIONERS' "AS-APPLIED" CHALLENGE TO KRS 189.635 TURNS ON THE PARTICULAR FACTS OF THIS CASE AND DOES NOT AFFECT PERSONS OTHER THAN THE PETITIONERS.

Part of the nature of the argument that a statute is "unconstitutional as applied" is the limitation of a case's application to its own facts and to the parties involved. When a statute is challenged "as applied," and is found to be facially valid, the District Court considers "the evidence presented . . . insofar as it sheds light on the manner in which the statute is presently being administered." *Bowen v. Kendrick,* 487 U.S. 589, 621 (1988). In particular, an "as-applied" challenge requires "focusing on the factual situation before us." *New York v. Ferber,* 458 U.S. 747, 768 (1982). *See also City of Lakewood v. Plain Dealer Publishing Co.,* 486 U.S. 750, 758-59 (1988) (referring to "case-by-case nature of 'as applied' challenges").

If Petitioners argue that KRS 189.635, though valid on its face, is being administered so as to affect them in an unconstitutional manner, such an argument turns solely on the particular facts of this case and affects only the parties to this case. As such, this case does not merit review by this Court, since it does not have far-reaching effects as to the constitutionality of KRS 189.635 or other similar statutes.

## V. PETITIONERS' ARGUMENTS CONCERNING JAMES BOGARD AND KRS 61.8745 WERE NOT PRESERVED IN THE LOWER COURTS AND MUST BE DISREGARDED.

For the first time in presenting their challenge to KRS 189.635 as applied, the Petitioners now advance the

argument that Petitioner James Bogard is a "news-gathering organization" within the definition of KRS 189.635(6), and that he is thus uniquely affected by the statute in a way that the other Petitioners are not. This argument cannot be heard on a petition for certiorari, since it has not been preserved for review.

In 2000, after the Sixth Circuit found KRS 189.635 facially constitutional and remanded this case for consideration of Petitioners' "as-applied" challenge, the District Court reassigned the case to Chief Judge John Heyburn due to the intervening death of District Judge Charles Allen. Judge Heyburn afforded the parties an opportunity to take discovery and present cross-motions for summary judgment on the "as-applied" challenge. At no point in their memorandum to the District Court did the Petitioners argue that James Bogard was a "news-gathering organization" or was differently affected by KRS 189.635 from the other Petitioners. On the contrary, the only reference to Bogard was a background recitation that he supplied accident information to lawyers via a newsletter and believed the statute "similarly infringed his First Amendment rights" (*i.e.,* similarly to how it affected the other Petitioners).

The Petitioners neither made the argument nor presented any evidence to the District Court that James Bogard was a "news-gathering organization," nor did they attempt to analyze his claim separately or differently from those of the other Petitioners. Judge Heyburn was never asked to rule on whether Bogard was a "news-gathering organization," or on whether KRS 189.635, as applied, abridged his freedom of speech any differently from the attorneys and chiropractors. The issue was waived.

Likewise, the argument Petitioners now raise as to James Bogard was not raised in the Circuit Court as a point of error on appeal. In their briefs before the Sixth Circuit, Petitioners never mentioned James Bogard at all. Rather, they consistently identified themselves as "attorneys and chiropractors" (or, in one instance, as "primarily attorneys and chiropractors"). The Sixth Circuit panel never heard Petitioners' argument that Bogard was a "news-gathering organization," or that KRS 189.635 as applied abridged Bogard's freedom of speech differently from its effect on the other Petitioners. Again, the issue was waived.

The Petitioners now claim that the Sixth Circuit "apparently did not recall . . . who the parties to the case were." (Pet. at 16.) In fact, it was the Petitioners who apparently forgot to make the argument they now belatedly attempt to introduce. At no time in the "as-applied" phase of this litigation did the Petitioners ever argue that James Bogard's claims should be separately analyzed under the "news-gathering organization" provision in KRS 189.635(6). No such argument was presented to the district judge or Sixth Circuit panel that considered their "as-applied" challenge.

In fact (contrary to the Petitioners' claim), even the Sixth Circuit's 1999 opinion (Pet. at 41a-42a; *Amelkin II,* 168 F.3d at 897) does not reflect a finding, or even an argument, that James Bogard was a "news-gathering organization." Rather, the court at that time was entertaining a facial overbreadth challenge to KRS 189.635, and struck it down based on a provision that did not apply to the Petitioners. The Sixth Circuit made it clear in 2003 (Pet. at 7a; *Amelkin IV,* 330 F.3d at 826) that the 1999

panel was addressing non-parties when it spoke of "news-gathering organizations":

> In asserting their own rights, however, the [Petitioners] cannot prevail on the theory that § 189.635 curtails the rights of ***other parties not before the court***. *Amelkin II* failed to recognize this point, and instead improperly focused on the restrictions that the statute placed upon news-gathering organizations ***rather than upon the [Petitioners].***

(Citation omitted; emphasis added.) At no time during the facial overbreadth litigation, then, was there a finding that James Bogard was a "news-gathering organization," and at no time during the "as-applied" litigation did Petitioners even attempt to assert that he was.

The law is well established that a new argument cannot be advanced on review that was not preserved in the proceedings below. *City of Springfield, Mass. v. Kibbe,* 480 U.S. 257, 259 (1987). Accordingly, James Bogard's claim must be analyzed no differently from those of the other Petitioners, just as it was treated in the courts below with Petitioners' evident approval. Only the application of KRS 189.635 to the Petitioners is at issue, and under the law of the case, *Amelkin III, supra; Amelkin, supra,* 531 U.S. 871 (Pet. at 24a), the Petitioners can make no overbreadth facial challenges to the statute based on its potential application to news-gathering organizations or other non-parties.

Also, the Petitioners now argue for the first time that *if* they obtained an accident report lawfully, they might theoretically be penalized for commercial speech thereafter by having to pay damages to a public agency

(characterized by Petitioners as "fines") under KRS 61.8745. This argument was neither presented to the District Court nor mentioned in Petitioners' briefs before the Sixth Circuit. Petitioners disingenuously claim that the Sixth Circuit "failed to recognize" the effect of KRS 61.8745, when in fact it was the Petitioners who failed to mention it below. Unpreserved arguments cannot be advanced for the first time in a petition for certiorari, and accordingly Petitioners' arguments concerning KRS 61.8745, not having been preserved below, should not be entertained by this Court.

## VI. THE PETITIONERS, EXCEPT POSSIBLY RHODA DANIELS, LACK STANDING TO CHALLENGE KRS 189.635 AS APPLIED.

In support of their summary judgment motion in the District Court, the Petitioners' only evidence that KRS 189.635 had been applied to them was certain unauthenticated correspondence between Petitioner Rhoda Daniels and the Kentucky State Police purporting to show that Ms. Daniels requested copies of some accident reports and the request was denied pursuant to KRS 189.635. Assuming *arguendo* that the correspondence is authentic, there is *no* evidence in the record that any of the other Petitioners requested copies of accident reports and were denied them under KRS 189.635. Accordingly, the Petitioners other than Rhoda Daniels do not have standing to challenge KRS 189.635 "as applied," since the statute was never in fact applied to them.

## VII. PETITIONERS' CONSTITUTIONAL CHALLENGE TO KRS 61.874 IS NOT PROPERLY BEFORE THE COURT.

The Sixth Circuit, affirming the District Court, correctly held that Petitioners' constitutional challenge to KRS 61.874 (dealing with fees for obtaining public records) was moot in light of the fact that the Petitioners were not entitled to obtain accident reports under KRS 189.635. The District and Circuit Courts therefore have not made any findings as to the constitutionality of KRS 61.874. As the Sixth Circuit correctly noted, this would be a matter for the District Court to reach only if KRS 189.635 had been found unconstitutional as applied to the petitioners. (Pet. at 13a; *Amelkin IV,* 330 F.3d at 829.) The only issue that is ripe for review is whether the challenge to KRS 61.874 was properly dismissed as moot in light of the constitutionality of KRS 189.635. Since Petitioners are not entitled to obtain the documents, pursuant to a constitutionally valid statute, the issue of fees is necessarily moot, and the Sixth Circuit properly so held.

## CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

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